Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-690

JOHN ELI STONE, RICHARD CARL BIGGS,
JOHN DAYTON RITTER, and
JAMES WILLIAM WINNINGHAM,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

John Eli Stone, Richard Carl Biggs, John Dayton Ritter and James William Winningham (hereinafter sometimes collectively referred to as "Petitioners") respectfully file this their Petition requesting this Court to issue its Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered on September 1, 1977.

OPINIONS BELOW

Fifth Circuit The Opinion of the Court of Appeals for the Fifth Circuit (Appendix A, infra, pp. A-1 to A-14) has not as yet been reported. An Order has been rendered, but not reported, denying the Application of Petitioners for Stay of Mandate.

District Court The oral opinion of the District Court denying the Motion of Petitioners to Suppress Evidence was not reported but is set forth in Appendix B, infra, p. A-15).

JURISDICTION

The Judgment of the Court of Appeals (Appendix A, infra, p. A-1) was entered on September 1, 1977 and Petitioners' timely Application for Rehearing was denied on October 14, 1977 (Appendix C, infra, p. A-16).

The jurisdiction of this Court is invoked pursuant to 28 *United States Code*, Section 1651, 28 *United States Code*, Section 2106, 28 *United States Code*, Section 1254(1) and Rule 37(b) of the *Federal Rules of Criminal Procedure*.

QUESTIONS PRESENTED

The evidence leading to conviction of Petitioners consisted of intercepted tape recorded telephone conversations from two (2) public pay telephones to which all the Petitioners, as well as others, were parties. A Motion to Suppress the intercepted communications was overruled by the District Judge. The

questions presented are concerned with whether the communications were intercepted in accordance with the strict requirements specified by the provisions of Title 18, *United States Code*, Section 2510, et seq. The issues are as follows:

1. Whether the Order signed by Judge William M. Taylor authorizing the interception of such communications was insufficient upon its face since it did not reflect the date when it was entered or signed by the Judge.

2. Whether the application and affidavit forming the basis for the Order authorizing interception was insufficient by reason of failing to contain a full and complete statement as to whether other investigative procedures had been tried and failed or why other investigative procedures appear to be unlikely to succeed or to be too dangerous.

3. Whether the interception of such communications was made in conformity with the Order of Authorization signed by the District Judge.

4. Whether the intercepted communications should have been suppressed as evidence since *Acting* Attorney General Robert Bork authorized the Application to the District Judge for an Order authorizing the interception of such communication.

5. Whether the intercepted communications should have been suppressed as evidence since the tape recordings were not taken before the District Judge, who had entered the Order of Authorization, for sealing under his direction

immediately upon termination of the interception.

STATUTES INVOLVED

This case involves consideration of 18 *United States Code*, Sections 2515, 2516, 2518 and 1955. These are reprinted in Appendix H, infra, pp. A-57 to A-69 and Appendix I, infra, pp. A-70 to A-72.

STATEMENT OF THE CASE

Reuben Goldstein, Anthony Paul Diadone and these four Petitioners were charged by a ten count Indictment returned in the Northern District of Texas with having violated Title 18, *United States Code*, Sections 1955, 1084 and 1952.

This is a wiretapping case. The evidence consisted of intercepted tape recorded telephone conversations to which all the Petitioners, as well as others, were parties. Petitioners filed a Motion to Suppress the intercepted communications as evidence and the Trial Judge overruled all the contentions therein contained. The same issues raised there and in the Fifth Circuit Court are the same as are presented before this Court.

Authorization for interception of the communications was supplied by an Order entered by the Honorable William M. Taylor, Jr., United States District Judge for the Northern District of Texas (Appendix D, infra, pp. A-17 to A-21). It authorized the Federal Bureau of Investigation to intercept telephone communications to and from two coin operated public telephones located at Denny's Restaurant, 3130 West Mockingbird Lane, Dallas,

Texas. *Nowhere does the Order reflect the date when it was entered or signed by the Judge.*

The Order states that, since the two telephones were located in a public restaurant and were coin operated, interception could take place only when John E. Stone was a party to the conversation.

The Order provided that the interceptions could continue only *"for a period of fifteen days from the date of this Order."* (Emphasis supplied.) The Order also required that the Judge be given reports on the fifth, tenth, and fifteenth days during the course of the interceptions.

To obtain the foregoing Order, Harold S. Jaquet, Assistant United States Attorney, filed an application accompanied by an affidavit executed by Robert Bryant, Special Agent, Federal Bureau of Investigation. (Appendix E, infra, pp. A-22 to A-51). At the time the Application was presented to Judge Taylor, Mr. Jaquet assured the Judge that the voice of John Eli Stone was well known and easily identifiable to the F.B.I.

Robert H. Bork, *Acting Attorney General*, specially designated the Assistant Attorney General in charge of the Criminal Division to authorize the application for the Order authorizing the interception of the communications. (Appendix G, infra, p. 56).

The interceptions took place from November 20, 1973, through December 4, 1973. Three five day reports were submitted to Judge Taylor during the course of the interception. (Appendix F, infra, pp. A-52 to A-55). Almost immediately after the interceptions

commenced Mr. Jaquet learned that the F.B.I. Agents conducting the wiretaps were having difficulty ascertaining the presence or absence of Mr. Stone in Denny's Restaurant and in identifying his voice but this information was not communicated, however, to Judge Taylor.

The original tape recordings were placed in boxes and taken before Judge Taylor on December 17, 1973. This was almost two weeks after the interception had been terminated.

REASONS FOR GRANTING THE WRIT

I.

The Order Authorizing the Interception of Communications Was Invalid On Its Face.

The Order signed by Judge Taylor authorizing the interception was insufficient on its face. Judge Taylor's Order was not dated and since the absence of a date on the wiretap order made the duration of the order unlimited by its own terms, the interceptions should have been suppressed.

Title 18, *United States Code*, Section 2518(4)(e) requires that the Order of Authorization specifically set forth the period of time during which the interception is authorized and Section 2518(5) states that no order may authorize or approve the interception of any oral or wire communications for "any period longer than is necessary to achieve the objective of the authorization, or in any event longer than thirty days."

Directly in point is *United States v. Lamonge*, 458

F.2d 197 (6th Cir., 1972), where the Sixth Circuit held that the absence of a date on the wiretap Order made the duration of the Order unlimited by its own terms, thereby invalidating the Order. Moreover, the addition of a date nunc pro tunc there, as was done here, did not save the Order because it was facially invalid when used.

The Fifth Circuit Court of Appeals has drawn a distinction between *Lamonge* and this case in that while the Order here was received by the District Clerk shortly after it was signed by Judge Taylor and was stamp dated by the Clerk November 20, 1973, the Order in *Lamonge* had no date stamped on it. However, there is no mention in *Lamonge* as to the absence of a date stamped on the order by the Clerk. In any event, a stamp date by the Clerk is certainly quite different from a date entered on an Order by the Presiding Judge.

The issue here is not whether Judge Taylor signed the Order on November 20, 1973, but whether, at the time it was used, it was a valid Order. Whether he did or did not sign it on that date does not change the fact that the wiretap authorization was on its face invalid at the time it was used. *United States v. Lamonge*, *supra*. Therefore, the interceptions should have been suppressed.

The Order was not used by Judges and Lawyers but by law enforcement officers whose authority to listen to the innermost conversations of others have been carefully circumscribed by Congress and the Fourth Amendment.

II.

The Order Authorizing the Interceptions Was Based Upon an Application and Affidavit Which Did Not Contain a Full and Complete Statement as to Whether or Not Other Investigative Procedures Had Been Tried and Failed or Why Other Investigative Procedures Appeared to be Unlikely to Succeed or to be Too Dangerous.

The application and affidavit forming the basis of the Order entered by Judge Taylor were insufficient as a matter of law because the affidavit did not contain a full and complete statement as to whether or not other investigative procedures had been tried and failed or why other investigative procedures appeared to be unlikely to succeed or to be too dangerous, as required by Title 18, *United States Code*, section 2518(1).

The opinion of the Fifth Circuit Court of Appeals is diametrically opposed to the opinion rendered by the United States Court of Appeals for the Ninth Circuit in *United States of America v. Kale Kalustian*, et al., 529 F.2d 585 (9th Cir., 1976).

The affidavit relied upon in the instant case was executed by Robert Bryant, an F.B.I. Agent. Paragraphs 19 and 20 of the Affidavit (Appendix E, infra, pp. A-49 to A-51) contain the only indication as to whether or not other investigative procedures have been tried and failed or why other investigative procedures appear to be unlikely to succeed if tried or to be too dangerous. Information contained in those two paragraphs is concerned exclusively with the experience of the Affiant and other F.B.I. Agents who handle gambling investigations. There is no detail as

to whether or not *actual* other investigative procedures have been tried or why they would probably fail if they were tried.

The Ninth Circuit Court of Appeals in *Kalustian* pointed out that Title 18,*United States Code*, Section 2510, et seq. "absolutely prohibits electronic surveillance by the Federal Government except under carefully defined circumstances and after securing judicial authority" and "procedural steps provided in the Act requires strict adherence." Moreover, the Ninth Circuit went on to point out that "other investigative techniques were usually slower and more difficult" but "unless they have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous, Title 18 *United States Code*, Section 2510, et seq. does not allow wiretapping to replace them." The identical affidavit was utilized in *Kalustian* as was utilized here and the Court said the statute was not satisfied and the Order of Authorization was invalid.

III.

The Interception of Communications Was Not Made In Conformity With the Order of Authorization Entered by Judge William M. Taylor.

Title 18, *United States Code*, Section 2518(10)(a) says specifically that the contents of intercepted communications must be suppressed if "the interception was not made in conformity with the order of authorization or approval." Judge Taylor Ordered (Appendix D, p. A-20), that these two "pay" telephones

> ". . . may be monitored only when it has been determined by surveillance that John Eli Stone is within the premises in which the telephones are located and may be intercepted only when it has been determined by voice identification that John Eli Stone is party to the conversation."

Harold Jaquet, the Assistant United States Attorney who handled the application for the wiretap and supervision thereof, testified that he *assured* Judge Taylor, before the order was signed, that the voice of John Eli Stone was *well known* and *easily identifiable* to the F.B.I. Then, Judge Taylor ordered Mr. Jaquet to make reports on the 5th, 10th, and 15th days during the time the interceptions were taking place as an extra added precaution because these were public telephones.

The Fifth Circuit Court of Appeals stated in its opinion:

> "The complications experienced by the agents were communicated to Judge Taylor in written and oral reports submitted at the end of each five day segment of the period of interception, as per the interception order."

The Court was, however, mistaken in this statement. Mr. Jaquet testified as follows:

> "Q. You at no time advised Judge Taylor during the existence of this wiretap that any difficulty was being had identifying, of course, the voice of Mr. Stone.?
>
> A. No, sir.
>
> Q. So we may assume that Judge Taylor was of the mind that he had been originally when he authorized the tap, that Mr. Stone's voice was one

> easily identifiable by those conducting the surveillance?
>
> A. True."

Mr. Jaquet also testified that he only reported to Judge Taylor those violations of Judge Taylor's Order that were specifically set forth in the three five day reports (which appear on pp. A-52 to A-55 of Appendix F.) Those three reports show nothing more than one or two violations of the Court's order when, in truth and in fact, there were a multitude of violations.

The Fifth Circuit Court of Appeals has observed that the monitored telephones were located in places not well suited for surveillance and monitoring agents encountered unexpected difficulty in identifying Stone's voice. However, once again, this is contrary to the assurances given to Judge Taylor before he signed the Order authorizing the wiretap in the first place.

These were, after all, two public "pay" telephones accessible to the general public and located at a place not far from what was then a busy international airport (Love Field in Dallas, Texas). It would have been unthinkable to exclude the precautions taken by Judge Taylor because they were absolutely necessary to insure that only those parties to this investigation would have their conversations listened to.

Suppression is demanded for a "failure to satisfy any of those statutory requirements that directly and substantially implement the congessional intention to limit the use of intercepted procedures to those situations clearly calling for the employment of this

extraordinary device." *United States v. Giordano*, 416 U.S. 505, 40 L.Ed.2d 341, 94 S.Ct. 1820 (1974).

This Court has taken the position that not "every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications unlawful." *United States v. Chavez*, 416 U.S. 562, 40 L.Ed.2d 390, 94 S.Ct. 1849 (1974). When, however, Congress intended a particular provision to play a central role in guarding against unwarranted use of wiretapping or electronic surveillance, then the interceptions must be suppressed as evidence. *United States v. Chavez, supra.*

For example, where the issuing Judge was incorrectly informed as to which designated official had authorized the application this was not substantial because the Justice Department had performed its task of prior approval. *United States v. Chavez, supra.* However, failure to satisfy the statutory requirement of prior approval by specified Justice Department officials was a central role in the statutory scheme because it bypassed a congressionally imposed limitation on the use of the intercept procedure. *United States v. Giordano, supra.* Again, failure of an intercept application to identify all those likely to be overheard in incriminating situations did not play a "substantial role" with respect to the additional authorization of the intercept order where the statutorily imposed preconditions as to judicial authorization were satisfied, and the issuing Judge was simply unaware that additional persons might be overheard in incriminating conversations because "in no meaningful sense can it be said that the

presence of that information as to additional targets would have precluded judicial authorization of the intercept." *United States v. Donovan*, 429 U.S. 413, 97 S.Ct. 658, 50 L.ED.2d 652 (1977).

It cannot be doubted that suppression is required when the interception is not made in conformity with the order of authorization because the authorization order certainly plays a central role in intercept cases. The statute says that suppression is required if the Order is violated.

In *Elkins v. United States*, 364 U.S. 206, 4 L.Ed.2d 1669, 80 S.Ct. 1437 (1960), this Court pointed out that the exclusionary rule is designed to deter future unlawful police conduct and effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guarantee in the only effectively available way — by removing the incentive to disregard it.-- See also *United States v. Calandra*, 414 U.S. 338, 38 L.Ed.2d 561, 94 S.Ct. 613 (1974); *Tehan v. Shott*, 328 U.S. 406, 15 L.Ed.2d 453, 86 S.Ct. 459 (1966); and *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968).

As the Court stated in *United States v. Calandra, supra*, the rule is one judicially created to safeguard Fourth Amendment rights generally through its deterrent effect. Aside from the fact that the wiretap statute requires suppression for failure to follow the intercept order, the exclusionary rule formulated by the Supreme Court requires suppression. What deterrent effect will there be if the F.B.I. is allowed to

intercept conversations under circumstances where they have been specifically proscribed from doing so?

One of the members of this Court could have easily used one of those pay telephones to discuss personal business as could any other citizen or Counsel for these Petitioners. Some examples of conversations which were listened to by the F.B.I. are (1) a conversation between one Bill Ruth and a stock brokerage firm wherein Mr. Ruth was inquiring as to the trading price of stcok, (2) two individuals discussing a football game, neither of which was John Stone, and (3) an entire conversation between gentlemen named Eddie Haynes and Dick Melvin. There are others.

This is more than was involved, for example, in *United States v. Doolittle*, 507 F.2d 1368 (5th Cir., 1975), en banc, 518 F.2d 500 (5th Cir., 1975), relied upon by the Fifth Circuit Court of Appeals in its opinion rendered in this cause. There, the Court said that there was no question but that some irrelevant and personal portions of gambling conversations were intercepted as well as certain nonpertinent conversations. Minimization was involved in that case but that is not the point here. The Court was not dealing with such an Order as was entered in this case, was not concerned with a public telephone and no representations to the Presiding Judge were apparently there made that the voice of the primary target defendant was easily identifiable. Presumably, there was no representation made to the Judge that the building where the telephone was located would be under surveillance.

These Petitioners respectfully request the Court to draw distinction between "minimization" as required by Title 18, *United States Code*, Section 2518, and the failure of the Government to intercept conversations in conformity with the Order of Authorization, because the two are separate and distinct items. Different rules of law are applicable. The question of "minimization" has been raised in a number of cases but it always involved personal, as opposed to public, telephones. Naturally, an otherwise valid wiretap should not be rendered invalid because of the simple inclusion of some irrelevant, personal and nonpertinent conversations of the suspected parties or those who might be using their telephone. But, this is not what we are dealing with here.

The facts involved here reflect numerous violations of Judge Taylor's order pertaining to interception occurring while John E. Stone was not in the restaurant as well as interceptions when he was not a party to the conversation. The "minimization" cases relate solely to interception of communications not dealing with the subject matter of the investigation.

The Court below said, in its opinion, "the fact that *most* of unauthorized interceptions occurred while voice identification was being made. . . ." is significant. (Emphasis supplied). The fact also is, however, that many of the unauthorized interceptions involved entire conversations to which John E. Stone was not a party.

The sum total is that either the F.B.I. has to intercept in conformity with the Court's Order or it does not. The statute mandates that the Court's Order be

followed or the interceptions shall be suppressed. Suppression is warranted in this case because the record is replete with instances where the Court's Order was violated.

IV.

The Order Authorizing the Interceptions Is Invalid Because the Attorney General Who Specially Designated an Assistant Attorney General to Authorize the Application for the Wiretap Was Only an "Acting" Attorney General.

Title 18, *United States Code*, Section 2516(1) requires that the Attorney General, or an Assistant Attorney General specially designated by the Attorney General, authorize the application to a Federal Judge for an Order authorizing the interception of communications.

In *United States v. Giordano, supra*, this Court reviewed the legislative history of the requirement that only the Attorney General, or one of his specially designated Assistant Attorneys General, could authorize the applications. In discussing the report of Congress pertaining to this particular Section, the Court stated:

> "This report is particularly significant in that it not only recognizes that the authority to apply for Court Orders is to be narrowly confined *but also declares that it is to be limited to those responsive to the political process* . . ." (Emphasis supplied)

In Footnote Nine to its Opinion, the Court points out that the Attorney General is appointed by the President, by and with the advice and consent of the

Senate, as are the nine Assistant Attorneys General. The Court went on to say that neither the Executive Assistant to the Attorney General nor any other officer in the Department of Justice except the Attorney General or a specially designated Assistant Attorney General, could authorize an application to a Federal Judge for an Order of Interception and

> ". . . . it is apparent that Congress desired to centralize and limit this authority where it was feasible to do so, a desire easily implemented in the Federal establishment by confining the authority to approve wiretap applications to the Attorney General or a designated Assistant Attorney General."

Here, Robert H. Bork, the Acting Attorney General, executed an instrument specially designating Henry Petersen, an Assistant Attorney General, to authorize the application to Judge Taylor in this case.

In *United States v. Acon*, 513 F.2d 513 (3d Cir.,1975) the court reviewed these statutory provisions and the language of this Court in *Giordano*. The Third Circuit went on to say:

> "Defendants assert that an Acting Assistant Attorney General cannot be designated specially under Section 2516(1) to authorize wiretaps. With this point, we agree.
>
> • • •
>
> In Giordano, improper authorization by the Attorney General's Executive Assistant rendered the interception unlawful and subject to suppression under Section 2518(10)(a)(i). According to the Court, Congress sought to restrict the use of electronic surveillance by restricting the power to authorize wiretaps to a small group of senior Justice Department officials. Violations of this

significant provision, therefore, were sufficient to warrant suppression.

> In the present case, the Government argues that an Acting Attorney General is not the same as the Attorney General's Executive Assistant. Although for other purposes this may be true, we cannot agree in this context. Congress has created a very narrow and specific authorization power. An Acting Assistant Attorney General is not mentioned in the statute. *Neither does an Acting Assistant Attorney General meet the Supreme Court's test of political responsiveness. As such, an Acting Attorney General who has not been appointed by the President and confirmed by the Senate, may not be designated to authorize wiretaps under Section 2516(1).*" (Emphasis supplied).

The Court went on to note that several District Court Opinions have held that an acting officer is outside the scope of Section 2516(1), citing *United States v. Narducci*, 341 F.Supp. 1107 (E.D. Pa., 1972) and *United States v. Boone*, 348 F.Supp. 168 (E.D. Va., 1972).

The Third Circuit also stated "we note but decline to follow a contrary holding in *United States v. Pellicci*, 504 F.2d 1106 (1st Cir., 1974).

The issue involved in *Pellicci* is the situation involved here, where Robert Bork authorized the application to the Judge for a wiretap order and the Court there concluded the statute was complied with.

However, the reasoning of the Court in *United States v. Acon, supra*, is obviously in line with the requirements of the United States Supreme Court as set forth in *United States v. Giordano, supra*.

V.

The Tape Recordings of the Intercepted Communications Were Not Taken Before Judge William M. Taylor for Sealing Under His Direction Immediately Upon Termination of the Interception.

Title 18, *United States Code*, Section 2518(a) requires that

> "*Immediately* upon the expiration of the period of the Order, or extensions thereof, such recordings shall be made available to the Judge issuing such order and sealed under his directions." (Emphasis supplied).

F.B.I. Agent Robert Bryant testified that the interception terminated on December 4, 1973. However, the contents were not made available to Judge Taylor "immediately" but instead were taken before Judge Taylor on December 17, 1973, some two weeks subsequent to the termination of the interception.

No justification was offered for disregarding the statute and failing to take the tapes immediately before Judge Taylor for sealing. It just simply wasn't done, although the statute requires it.

In *United States v. Giordano, supra*, this Court made it abundantly clear that the purpose of the wiretapping statute was effectively to prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in the statute. The Court went on to emphasize those specific requirements made by the statute for the protection of individual rights and unequivocally stated that one such requirement is

official control of the custody of any recordings or tapes produced by the interceptions.

The Fifth Circuit ruled in *United States v. Sklaroff*, 506 F.2d 837 (5th Cir., 1975), that a delay of 14 days in taking the recordings to the Judge who issued the interception order was not enough to require suppression, but at the same time the Court said that "the purpose of this provision of the statute is to safeguard the recordings from editing or alteration." Further, that the Government accounted for the delay. Here, the Government did not account for the delay.

The Fifth Circuit also stated in this case that suppression was not required absent a showing by the Petitioners that they had been prejudiced by the delay or that the integrity of the interceptions had been in any way disturbed. However, this is not what the statute says. It states only that they will "immediately" be taken. Two weeks later is not "immediately." Like every other provision of the statute, this particular provision is designed obviously to protect the rights of those whom the Government seeks to wiretap and no justification exists for the recordings not being taken before Judge Taylor immediately subsequent to December 4, 1973.

CONCLUSION

Surely not another case has existed where the facts demonstrate a complete failure to comply with the wiretapping statute. Error after error was committed by the Government in this case, beginning with the Attorney General in authorizing the Application to Judge Taylor, continuing with a defective

Application and Affidavit, the securing of an order facially defective and, finally, carrying on through the actual wiretapping itself where the wiretapping was not completed in conformity with the Order of Authorization.

The Court of Appeals for the Fifth Circuit has rendered an opinion in this case which conflicts with the opinion rendered by the Court of Appeals for the Third Circuit in *United States v. Acon, supra*, with reference to whether an "Acting" Attorney General may authorize an Application to a United States District Judge for an Order allowing interception of communications.

The opinion rendered by the Court of Appeals for the Fifth Circuit in this case conflicts with the opinion rendered by the Court of Appeals for the Sixth Circuit in *United States v. Lamonge, supra*, with reference to whether an undated order authorizing the interception of communications is defective upon its face.

The Court of Appeals for the Fifth Circuit has rendered an opinion in this case which conflicts with the opinion rendered by the Court of Appeals for the Ninth Circuit in *United States v. Kalustian, supra*, as to the necessity of the F.B.I. pursuing other investigative procedures prior to obtaining an Order authorizing interception of communications.

The Supreme Court should grant its Writ of Certiorari in order to resolve the conflicts which exist between the Circuit Courts of Appeal as outlined above and, after consideration of this case, reverse the

Judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

True and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed, postage prepaid, to Charles Cabaniss, Assistant United States Attorney, Northern District of Texas, Dallas Division, Federal Building, 1100 Commerce Street, Dallas, Texas, and to The Solicitor General, Washington, D.C., on the 14th day of November, 1977.

Lester L. May

APPENDIX A

United States Court of Appeals,
Fifth Circuit.
Sept. 1, 1977.
United States of America,
Plaintiff-Appellee,

v.

Anthony Paul Diadone, John Eli Stone, Richard Carl Biggs, Reuben Goldstein, and John Dayton Ritter,
Defendants-Appellants.

United States of America,
Plaintiff-Appellee,

v.

James William "Puny" Winningham,
Defendant-Appellant.

Nos. 75-2991, 75-3222.

Appeals from the United States District Court for the Northern District of Texas.

Before TUTTLE, THORNBERRY, and TJOFLAT, Circuit Judges.

THORNBERRY, Circuit Judge:

Appellants, defendants below, stand convicted of (1) conducting an illegal gambling business in violation of 18 U.S.C. § 1955, and (2) using wire communications in interstate commerce to engage in the business of betting or wagering in violation of 18 U.S.C. § 1084[1]. Much of the evidence was stipulated, and most of it emerged through wiretaps placed on defendant Stone's telephone and on two public pay

[1] Not all of the defendants were convicted of both of these crimes. All defendants except Biggs were convicted of violating § 1084. Defendants Stone and Biggs were also convicted of violating § 1955.

telephones in defendant Stone's restaurant. The government claimed authority for the tap under an order issued by Judge Taylor of the Northern District of Texas. The defendants moved to suppress the evidence intercepted through these taps, as well as evidence obtained by reason of the interceptions. The trial court denied the motion, and the case proceeded to trial and conviction.

Defendants raise a total of twelve issues on appeal. Most of these issues concern the admissibility of the evidence intercepted through the wiretaps. Some defendants raise additional claims unconnected to the wiretap order. The defendants' arguments on these issues do not merit reversal of the convictions. We affirm the district court as to all defendants.

I.

All of the defendants contend that the trial court erred in refusing to suppress the contents of intercepted oral communications because the order authorizing interception was not dated at the time it was signed by the district court. In essence, defendants urge that since the order authorizing the wiretapping was not dated when it was signed, the interception was authorized for a period of time unlimited by the order. This is impermissible under 18 U.S.C. §2518(4)(e), and *Berger v. New York*, 388 U.S. 41, 87 S.CT. 1873, 18 L.Ed.2d 1040 (1967). After a hearing where Harold Jaquet, former Assistant United States Attorney in charge of investigation in this case, and FBI Special Agent Bryant testified that Judge Taylor signed the order authorizing the interception of wire communications on November 20, 1973, the order was

amended *nunc pro tunc* pursuant to F.R.Crim. P. 36. Rule 36 allows the correction of "clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight and omission."

Defendants rely primarily upon a Sixth Circuit case, *United States v. Lamonge*, 458 F.2d 197 (6 Cir. 1972), *cert. denied*, 409 U.S. 863, 93 S.Ct. 153, 34 L.Ed.2d 110 (1972). *Lamonge* held that the absence of a date on a wiretap order makes the duration of the order unlimited, thereby invalidating the order. The addition of a date *nunc pro tunc* did not save the order — it was facially invalid and the evidence obtained under it should have been suppressed.

The instant case differs from *Lamonge* in at least one important respect. The order in *Lamonge* had no date stamped on it, while the order in this case was received by the district court clerk shortly after it was signed by Judge Taylor, and was stamp-dated by the clerk November 20, 1973.

In view of the fact that the order authorizing interception in this case was dated when it was received by the district court clerk on the same day that it was signed by Judge Taylor, we hold that the failure to date the order at the time it was signed by Judge Taylor was a clerical mistake that could be corrected under Rule 36. To the extent which this result departs from that reached by the Sixth Circuit in *Lamonge*, we decline to follow the Sixth Circuit's path.

II.

Defendants Stone, Biggs, and Goldstein contend that the trial court erred in denying the motion to suppress because the order authorizing the interception was based upon an insufficient application and affidavit. The controlling statute, 18 U.S.C. § 2518(1)(c), requires every application for a wiretap or interception order to contain, *inter alia*, "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." The claimed defect in this case is that the affidavit did not contain such a full and complete statement.

The purpose of the "full and complete statement" requirement, as expressed by cases decided by our Circuit, is to inform the issuing judge of the difficulties involved in the use of the conventional techniques, rather than to establish that every other imaginable mode of investigation would be unsuccessful. *United States v. Pacheco*, 489 F.2d 544 (5 Cir. 1974), *cert. denied*, 421 U.S. 909, 95 S.Ct. 1558, 43 L.Ed.2d 774 (1975). The tests for sufficiency of the statement of facts directs the court to take a common sense view of the statement. *United States v. Robertson*, 504 F.2d 289 (5 Cir. 1974), *cert. denied*, 421 U.S. 913, 95 S.Ct. 1568, 43 L.Ed.2d 778 (1975).

Agent Bryant's thirteen page affidavit supporting the application sets forth the details of the gambling operations as related to various agents by six confidential informants. The affidavit asserted that

conventional surveillance techniques had proven and were likely to be ineffective because most of the gambling activity transpired over the telephone. A search of defendant's residences would likely be ineffective, asserts affiant, because gambling operations frequently maintan only temporary records which often are in cypher. Furthermore, during raids to seize such records, gambling operators frequently destroy what records they have. Finally, afiant asserts that the government's informers will not testify at trial because of fear for their safety.

We have held a similar statement of facts sufficient to justify the grant of an interception order. *See United States v. McCoy*, 539 F.2d 1050 (5 Cir. 1976) (*McCoy II*). In *McCoy II*, we stated:

> [T]he possibility that wiretaps may almost always be approved in similar bookmaking cases does not make "formalities" of §§ 2518(1)(c) and (3)(c). The application must still contain the "full and complete statement". The decision whether to order a wiretap is then to be made by the district court exercising its discretion. *See United States v. Smith*, [9 Cir.] 519 F.2d [516] at 518. That court, in an effort to make the § 2518(3)(c) finding, "May require the applicant to furnish additional testimony or documentary evidence in support of the application". 18 U.S.C. § *2518(2). In the absence of additional evidence a wiretap order might well be denied. We do not, therefore, judicially abrogate* §§ 2518(1)(c) and (3)(c) with respect to § 1955 investigations. We simply hold that the district court's discretion was exercised here upon sufficient factual representations.

539 F.2d at 1056.

The instant statement, when considered with the facts averred, likewise satifies the relevant standards.

III.

Defendants Stone and Biggs argue that the trial court erred in refusing to suppress the intercepted communications because the application to Judge Taylor did not have proper authorization. 18 U.S.C. § 2516(1) permits application for an interception order only upon the authorization of the Attorney General or an Assistant Attorney General specially designated by the Attorney General. The authorization in this case was executed by Assistant Attorney General Henry Petersen. He issued the authorization under power delegated to him by *Acting* Attorney General Robert H. Bork. Bork, goes the defendant's argument, was not an Attorney General and therefore could not authorize the application and could not delegate the power to do so.

We have previously held that in such matters Acting Attorney General Bork stood in the shoes of the Attorney General and possessed the powers of the Attorney General. *See United States v. McCoy*, 539 F.2d 1050, 1054 (5 Cir. 1976) (*McCoy II*); *United States v. McCoy*, 515 F.2d 962, 963 (5 Cir. 1975), *cert. denied*, 423 U.S. 1059, 96 S.Ct. 795, 46 L.Ed.2d 649 (1976) (*McCoy I*). *See also United States v. Pellicci*, 504 F.2d 1106, 1107 (1 Cir. 1974), *cert. denied*, 419 U.S. 1122, 95 S.Ct. 805, 42 L.Ed.2d 821 (1975): "There is no basis for concluding that one 'acting' as Attorney General has fewer than all the powers of that office." This asserted deficiency in the authorization does not doom the interception order.

IV.

Defendants Stone, Biggs, Winningham, and Goldstein contend that the interception of wire communications was not made in conformity with the order of authorization signed by Judge Taylor. As to the pay telephones in the restaurant, the order restricted monitoring to those times when Stone was in the restaurant and permitted interception of only those calls to which Stone was a party. Defendants argue that the wiretap evidence in question should have been suppressed because of approximately 92 violations of these aspects of Judge Taylor's order, and because Judge Taylor was not told of all the unauthorized interceptions during the court of the wiretaps.

In *United States v. Doolitle*, 507 F.2d 1368 (5 Cir. 1975), *en banc*, 518 F.2d 500 (5 Cir. 1975), *cert. dismissed as to petitioner Baxter*, 423 U.S. 1008, 96 S.Ct. 439, 46 L.Ed.2d 380 (1975), *cert. denied sub nom. Anderson v. United States* ____U.S. ____, 97 S.Ct. 1172, 51 L.Ed.2d 580 (1977), *sub nom. Malloway v. United States*, ____ U.S. ____, 97 S.Ct. 1173, 51 L.Ed.2d 580 (1977), *sub nom. Doolittle v. United States*, *id.*, this court also confronted an attack upon the scope of the interceptions authorized by court order. "There is no question that some irrelevant and personal portions of gambling conversations were intercepted or that certain nonpertinent conversations were intercepted. But this is inherent in the type of interception authorized by Title III, and we do not view the simple inclusion of such conversations, without more, as vitiating an otherwise valid wiretap." 507 F.2d at 1372.

So long as the monitoring agent listened to each call only long enough to determine whether it dealt with the subject matter of the district court's order, the interception of irrelevant conversations would not render all of the intercepted conversations inadmissible. *See United States v. Armocida*, 515 F.2d 29 (3 Cir.), *cert. denied*, 423 U.S. 858, 96 S.Ct. 111, 46 L.Ed.2d 84 (1975).

In the hearing on defendant's motion to suppress, Mr. Jaquet, the Assistant United States Attorney in charge of the interception, testified that as to the taps on the pay telephone: (1) sometimes, there was difficulty in determining whether Stone was in the restaurant and, in fact, Stone left the premises on several occasiosn without being observed; (2) the monitored telephones were located in places not well suited for surveillance; (3) monitoring agents encountered unexpected difficulty in identifying Stone's voice; and (4) the complications experienced by the agents were communicated to Judge Taylor in written and oral reports submitted at the end of each five-day segment of the period of interception, as per the interception order.

In view of the foregoing factors related by Mr. Jaquet and the fact that most of the unauthorized interceptions occurred while voice identification was being made, the district court acted properly in denying defendant's motion to suppress on this ground.

V.

Defendants Stone and Biggs contend that the district court erred in refusing to grant their motion to

suppress because the tape recordings of intercepted conversations were not taken to Judge Taylor immediately upon the expiration of the authorized interception period. 18 U.S.C. § *2518(8)(a). The tapes were not taken to Judge Taylor until about two weeks after the order expired.*

The government relies upon United States v. Sklaroff, 506 F.2d 837, 840 (5 Cir. 1975), *cert. denied*, 423 U.S. 874, 96 S.Ct. 142, 46 L.Ed.2d 105 (1975) (*Sklaroff I*), where this court held that a fourteen day delay did not amount to a violation of § 2518(8)(a) where there was no showing of prejudice to the defendants and the government accounted for the delay. The defendants have not shown that they were prejudiced by the delay or that the integrity of the interceptions was in any way disturbed. There was no error in refusing to suppress the evidence on this basis.

VI.

Defendant Goldstein argues that the government failed to serve him with a notice of inventory as required by § 2518(8)(d).

The interception period was in November and December of 1973. According to the government, Goldstein's voice was identified in April or May of 1974; Goldstein's attorney was told during August of 1974 that Goldstein had been overheard, and Goldstein was compelled to appear before the grand jury in Dallas during that same month. An additional inventory notice ws mailed to Goldstein on April 7, 1975. The hearing on defendants' motion to suppress did not occur until June 6, 1975.

Section 2518(8)(d) provides that within ninety days after the termination of the authorized interception period, the issuing judge "shall cause to be served, on the persons named in the order . . ., and such other parties to intercepted communications as the judge may determine in his discretion that it is in the interest of justice" an inventory notice, informing these persons of the existence and dates of the interception. The statute does not require that inventory notice be sent to persons not named in the order. The judge acts in his discretion. *United States v. Donovan*, 429 U.S. 413, 97 S.Ct. 658, 669, 50 L.Ed.2d 652 (1976).

Since Goldstein was not named in the order[2], the judge was not required to send him inventory notice under § 2518(8)(d). Still, Goldstein actually received the equivalent of inventory notice ten months before the hearing on the motion to suppress. The district court committed no error when it denied this claim in the motion to suppress.

VII.

Defendant Ritter contends that the wiretap evidence should have been suppressed as to him because he was known to be involved in the gambling transactions in question, but was not named in the application for the wiretaps.

If the government has probable cause to believe that an individual is engaged in the criminal activity under investigation and expects to intercept that individual's conversations over the tapped

[2] We do not understand Goldstein to argue that his name should have been included in the application and order.

telephones, his name must be included in the application to intercept. *United States v. Donovan*, 429 U.S. at 427-428, 97 S.Ct. at 668, 50 L.Ed.2d at 667-668.

Although Ritter was a known gambler, the government contends that he was not known to be involved in the gambling operation being investigated, and that his voice was not identified until December 4, 1973 (the date of the termination of the authorized interception period). After it was discovered that Ritter was involved, a notice of inventory was sent to him on February 11, 1974.

Even if the application should have contained Ritters' name, the failure to do so does not compel suppression of the interceptions. *United States v. Donovan*, 429 U.S. at 435-437, 97 S.Ct. at 672-73, 50 L.Ed.2d at 672-673; *United States v. Alfonso*, 552 F.2d 605 (5 Cir. 1977); *United States v. Sklaroff*, 552 F.2d 1156 (5 Cir. 1977) (*Sklaroff II*).

VIII.

Defendant Ritter also argues that the order authorizing the installation of pen register devices was defective because it contained errors in the digits of the telephone listed.

One of the numbers listed in the pen register order is 358-0996. The order authorizes installation of pen registers on certain numbers, including 384-0996. Agent Bryant's affidavit correctly identifies the number as 368-0996.

The government states that the variance is immaterial, citing *United States v. Doolittle, supra*, and *United States v. Sklaroff, supra (Sklaroff I)*. In

Sklaroff I, the court found that an error in one digit in one telephone number, and the transposition of two digits in an exchange number (691, stated as 961), were clerical errors and presented no ground for suppression. 506 F.2d at 840. Similarly, the court in *Doolittle* held that one incorrect digit in one of four telephone numbers was an immaterial variation from the actual number which did not warrant reversal of the district court's decision. 507 F.2d at 1371.

The application for interception, the order authorizing interception, and Bryant's affidavit all contained the correct number, 368-0996. Therefore, we hold that the errors in the order to install pen registers were clerical. The district court properly denied Ritter's motion to suppress.

IX.

Defendant Goldstein argues that the provisions of 18 U.S.C. §§ 2510-2520, which permit wiretapping and electronic surveillance, contravene the First, Fourth, Fifth, and Sixth Amendments to the Constitution.

This argument has no merit. We have twice held that the challenged statutes do not contravene these constitutional safeguards. *United States v. Sklaroff (Sklaroff I)*, 506 F.2d at 840; *United States v. Doolittle*, 507 F.2d at 1370.

X.

Defendants Stone and Biggs contend that the trial court did not find five or more persons who conducted, financed, managed, supervised, directed, or owned all or part of the alleged illegal gambling business, as

required for a violation of 18 U.S.C. § 1955.

According to *United States v. Bridges*, 493 F.2d 918, 921 (5 Cir. 1974), "almost anyone who works in the gambling enterprise counts towards making up the minimum five . . ." *See also United States v. Ciamacco*, 362 F.Supp. 107, 111 (W.D.Pa. 1973): "It is well established that all participants in the operation of an illegal gambling business, except customers placing bets, are conducting that business for purposes of § 1955. . . ."

On page 405 of the Record, the district court stated in the "Findings by the Court on Stipulations of Evidence" that Stone was involved in an illegal gambling business in which five or more persons shared responsibilites. A similar finding with regard to Biggs is found on page 408 of the Record. There is no challenge to the evidentiary support for these findings. The district court's findings satisfy § 1955.

XI.

Stone and Biggs further contend that Count One of the indictment should have been dismissed because it alleged that these defendants "owned" all or part of the gambling business, whereas the government stated in its response to defendants' Motion for a Bill of Particulars that the owners of the alleged illegal gambling business were unknown.

This argument has no merit. Although the government's response to item 18(d) of the Motion for a Bill of Particulars states that the names and addresses of all owners were unknown, it continues to say that the names and addresses of the owners probably include

the names listed in 18B as participants. Stone and Biggs were listed in 18B. By including the words "and owners" in the indictment the government was merely stating another way that Stone and Biggs could be in violation of § 1955, and that it was not incumbent upon the government to prove that they were the "owners." It was only necessary that Stone and Biggs participated in the gambling operations in one of the ways listed in the indictment.

XII.

The final argument raised by defendants Stone and Biggs is that there is sufficient evidence to support their convictions. Defendant Biggs contends that the evidence reflects that he was a bettor and not a bookmaker. Both Stone and Biggs assert that the evidence in the record is insufficient to support their convictions because certain stipulations of evidence were never formally admitted into evidence.

Stipulation of Evidence Number 1 states that Biggs relayed line (or odds) information to Stone, and that Biggs and Stone instructed one another to place bets on certain games. This evidence indicates that Biggs was not merely a bettor, but was actually a participant in the operation. *See United States v. Milton*, 555 F.2d 1198 (5 Cir. 1977).

Likewise, the record reflects that the stipulations in question were admitted into evidence. R. Vol. VII at 33-37. There is no error here.

Accordingly, the judgment of the district court is, in all respects,

AFFIRMED.

APPENDIX B

[77] MR. PRATHER:

Your honor, briefly, there are cases that hold actual notice satisfies the inventory situation, and certainly Mr. Goldstein and his attorney received actual notice of the wiretap, and that notice came even before the Motion to Suppress and before trial and that has been held to be sufficient.

The unauthorized calls, we do not deny that there were unauthorized calls. There were attempts made to minimize the unauthorized calls and those reported, written as well as verbal, to Judge Taylor, and he was made aware of those.

As far as Mr. Ritter, his notice and his satisfaction, I would merely state that Mr. Emerson has got his facts confused about a telephone call, receipt of tapes by Agent Cecil and that whole scope of events up there, and merely Ritter received notice and his rights have not been violated.

We ask the Court to overrule the Motion to Suppress.

THE COURT:

I do think there are some problems that are doubtful in this case, but I'm going to overrule the Motion.

If there are other Motions to be considered, take them up with the District Attorney and he will come to me and have them set.

MR. BURNETT:

Well, Your Honor, there is one that is of the . . . [78]

APPENDIX C

UNITED STATES COURT OF APPEALS
Fifth Circuit

Office of the Clerk

October 14, 1977

TO ALL PARTIES LISTED BELOW:

No. 77-2991 & 75-3222 — U.S.A. V. Diadone, et al.,
U.S.A. v. Winningham

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
Edward W. Wadsworth, Clerk
By Brenda M Hauck
Deputy Clerk

**on behalf of all appellants,

cc:

Mr. L. N. Westerlace
Messrs. Lester L. May
Kenneth Herridge
Messrs. Douglas G. Crosby
Stephen Stein
Messrs. Cecil Emerson
Robert T. Baskett
Messrs. Charles D. Cabaniss
Robert C. Prather
Mr. Warren Burnett
Richard J. Clarkson

APPENDIX D

In The United States District Court
For the Northern District of Texas
Dallas Division

In the Matter of Application of the United States
for an Order Authorizing the Interception
of Wire Communications

Misc. No. W-I-3-5

ORDER

Authorizing Interception of Wire Communications

To: Special Agents of the Federal Bureau of Investigation

Application under oath having been made before me by Harold S. Jaquet, an Assistant United States Attorney assigned to the Northern District of Texas at Dallas, and an "investigative or law enforcement officer" as defined in Section 2510(7) of Title 18, United States Code, for an Order authorizing interceptions of wire communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matter set forth therein, the Court finds:

(a) There is probable cause to believe that JAMES PETER VOURAS, EDGAR HAYNES, ISADORE MAX MILLER, GARY FRIARSON, JOHN ELI STONE, ANTHONY PAUL DIADONE, and others as yet unknown, have been and are now committing offenses involving the interstate transportation of wagering odds, the operation of an illegal gambling business and use of interstate telephone facilities to aid in racketeering in violation of Title 18, United States Code, Sections 1084, 1952, 1955 and Article 652(a), Texas Penal Code, in the Northern District of Texas and the

aforementioned individuals are conspiring to commit the above offenses in violation of Title 18, United States Code, Section 371.

(b) There is probable cause to believe that particular wire communications concerning these offenses will be obtained through the interception, authorization for which is hereby given. In particular, these wire communications will concern the receiving of betting odds and information, the conducting of an illegal gambling business, the interstate travel to distribute the proceeds of an illegal gambling business, and the identities of unknown co-conspirators involved in the above offenses.

(c) Normal investigative procedures either have been tried without success or reasonably appear unlikely to succeed if continued, or reasonably appear unlikely to succeed if tried.

(d) There is probable cause to believe that in carrying out the offenses detailed above that Edgar Haynes, John Eli Stone, Anthony Paul Diadone and others as yet unknown, have used and are using the following telephones:

(214) 351-9106 subscribed as a public telephone located inside the Denny's Restaurant, 3130 W. Mockingbird Lane, Dallas, Texas;

(214) 352-0252 subscribed as a public telephone located inside Denny's Restaurant, 3130 W. Mockingbird Lane, Dallas, Texas;

(214) 368-0996 subscribed to Val May Stone at 8548 Pickwick, Apt. B, Dallas, Texas.

WHEREFORE, it is hereby ORDERED that:

Special Agents of the Federal Bureau of Investigation are authorized pursuant to application by the Assistant Attorney General of the Criminal

Division, The Honorable Henry E. Petersen, who has been specifically designated by the Acting Attorney General of the United States, The Honorable Robert H. Bork, to exercise the power conferred on him by Section 2516 of Title 18, United States Code, to intercept wire communications concerning the above-described offenses of Edgar Haynes, John Eli Stone, Anthony Paul Diadone and others as yet unknown, to and from the following telephones:

(214) 351-9106 subscribed as a public telephone located inside the Denny's Restaurant, 3130 W. Mockingbird Lane, Dallas, Texas;

(214) 352-0252 subscribed as a public telephone located inside Denny's Restaurant, 3130 W. Mockingbird Lane, Dallas, Texas;

(214) 368-0996 subscribed to Val May Stone at 8548 Pickwick, Apt. B, Dallas, Texas.

and to install such devices.

Such interception shall not terminate automatically when the type of communications described above have first been obtained, but shall continue until communications are intercepted which reveal the manner in which James Peter Vouras, Edgar Haynes, Isadore Max Miller, Gary Friarson, John Eli Stone, Anthony Paul Diadone, and others as yet unknown, participate in the interstate sending, receiving, disseminating and publiction of wagering odds and information, the operation of an illegal gambling business and the interstate travel to distribute the proceeds of an illegal gambling operation, in violation of Title 18, United States Code, Section 1084, 1952, 1955 and Article 652(a), Texas

Penal Code, and a conspiracy to commit such offenses in violation of Title 18, United States Code, Section 371; and which reveal the identities of their confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of fifteen (15) days from the date of this Order, whichever is earlier.

It is further ORDERED upon request of applicant that the Southwestern Bell Telephone Company, a communication carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the persons whose communications are to be intecepted, and the furnishings of such facilities or technical assistance by Southwestern Bell Telephone Company to be compensated for by the applicant at the prevailing rates.

Providing that the above-described wire communications to and from the coin-operated telephones bearing numbers (214) 351-9106 and (214) 352-0252 may be monitored only when it has been determined by surveillance that John Eli Stone is within the premises in which the telephones are located and may be intercepted only when it has been determined by voice identification that John Eli Stone is a party to the conversation.

PROVIDING FURTHER THAT this authorization to intercept wire communications shall be executed as soon as practicable after signing of this Order and

shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interceptions under Chapter 119 of Title 18, United States Code, and must terminate upon the attainment of the authorized objective, or in any event, at the end of fifteen (15) days from the date of this Order.

PROVIDING ALSO THAT Harold S. Jaquet shall provide the Court with a report on the 5th, 10th, and 15th day following the date of this Order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

W. M. Taylor

United States District Judge

APPENDIX E

In The United States District Court
For the Northern District of Texas
Dallas Division

In the Matter of Application of the United States for an Order Authorizing the Interception of Wire Communications

Misc No. W-I-3-5

APPLICATION

Harold S. Jaquet, an Assistant United States Attorney at Dallas, Texas, in the Northern District of Texas, United States Department of Justice, being duly sworn, states:

1. He is an "investigative or law enforcement officer . . . of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, that is, he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

2. Pursuant to the authority vested in him by Section 2516 of Title 18, United States Code, the Acting Attorney General of the United States, The Honorable Robert H. Bork, has specifically designated the Assistant Attorney General in charge of the Criminal Division, The Honorable Henry E. Petersen, to exercise the power conferred on him by Section 2516 of Title 18, United States Code, to authorize this application. Under the power delegated to him by special designation of the Acting Attorney General, the Assistant Attorney General of the Criminal Division has authorized this application. Attached to this

application as Exhibit A are a copy of the Order of the Acting Attorney General specifically designating the Assistant Attorney General of the Criminal Division to act in these matters and a copy of the memorandum of authorization of the Assistant Attorney General of the Criminal Division, The Honorable Henry E. Petersen.

3. This application seeks authorization to intercept wire communications of John Eli Stone, Anthony Paul Diadone, Isadore Max Miller, Gary Friarson, James Peter Vouras, Edgar Haynes and others as yet unknown, concerning offenses enumerated in Section 2516 of Title 18, United States Code, that is, offenses involving the interstate transmission of wagering odds and information, the operating of an illegal gambling business and use of interstate telephone facilities in aid of a racketeering enterprise in violation of Sections 1084, 1952 and 1955 of Title 18, United States Code, Article 652(a), Texas Penal Code, and a conspiracy to commit such offenses, in violation of Section 371 of Title 18, United States Code, which offenses have been committed and are being committed by John Eli Stone, Anthony Paul Diadone, Isadore Max Miller, Gary Friarson, James Peter Vouras, Edgar Haynes and others as yet unknown.

4. He has discussed all the circumstances of the above offenses with Special Agent Robert M. Bryant of the Dallas, Texas, Office of the FBI, who has participated in the conduct of the investigation herein, and has examined the affidavit of Special Agent Bryant (attached to this application as Exhibit B and

incorporated by reference herein) which alleges the facts therein, in order to show that:

(a) There is probable cause to believe that John Eli Stone, Anthony Paul Diadone, Isadore Max Miller, James Peter Vouras, Gary Friarson, Edgar Haynes and others as yet unknown have been and are now committing offenses involving the interstate transmission of wagering odds and information and the use of interstate telephone facilities in aid of racketeering, the operation of an illegal gambling business by five or more persons, which illegal business has a gross revenue substantially in excess of two thousand dollars in a single day, in violation of Sections 1084, 1952 and 1955 of Title 18, United States Code, Article 652(a), Texas Penal Code, in the Northern District of Texas and the aforementioned individuals are conspiring to commit the above offense in violtion of Section 371 of Title 18, United States Code.

(b) There is probable cause to believe that particular wire communications of John Eli Stone, Anthony Paul Diadone, Edgar Haynes and others as yet unknown and unidentified, concerning the aove offenses will be obtained through such interceptions, authorization for which is applied for herein. In particular, these wire communications will concern the interstate transmission of wagering odds and information, the placing and accepting of bets and wagers and the identities of unknown conspirators involved in the above offenses.

(c) The attached affidavit contains a full and complete statement explaining why normal investi-

gative procedures either have been tried and have failed or reasonably appear unlikely to succeed if continued or reasonbly appear unlikely to succeed if tried.

(d) There is probable cause to believe that, carrying out the offense detailed above, John Eli Stone, Anthony Paul Diadone, Edgar Haynes and others as yet unknown are using the telephone bearing numbers:

(214) 351-9106 subscribed as a public phone located at Denny's restaurant, 3130 West Mockingbird Lane, Dallas, Texas;

(214) 352-0252 subscribed as a public telephone located at Denny's Restaurant, 3130 West Mockingbird Lane, Dallas, Texas;

(214) 368-0996 subscribed as Val May Stone, 8548 Pickwick, Apartment B, Dallas, Texas.

5. No previous applications are known to have been made to judges of competent jurisdiction for authorization to intercept or for approval of interception of wire or oral communications involving any of the same persons, facilities or places specified herein.

WHEREFORE, your applicant believes that probable cause exists to believe that Edgar Haynes, John Eli Stone, Anthony Paul Diadone, Isadore Max Miller, Gary Friarson, James Peter Vouras and others as yet unknown and unidentified have benn and are now committing offenses involving the interstate transportation of wagering odds and information, interstate travel in aid of racketeering, the opera-tion of an illegal gambling business, in the Northern

District of Texas, in violation of Title 18, United States Code, Sections 1084, 1952, 1955, Article 652(a), Texas Penal Code and a conspiracy in violation of Title 18, United States Code, Section 371; that Edgar Haynes, John Eli Stone, Anthony Paul Diadone and others as yet unidentified have used, are using and will continue to use the telephones described above in connection with the commission of the above-described offenses; and that communications of the above-named persons concerning those offenses will be obtained through the interception, authorization for which is herewith applied for; and that normal investigative procedures reasonably appear unlikely to succeed if tried.

On the basis of the allegations contained in this application and on the affidavit of Special Agent Bryant attached hereto and made a part hereof, affiant requests this Court to issue an Order, pursuant to the power conferred on it by Section 2518, Title 18, United States Code, authorizing Special Agents of the Federal Bureau of Investigation to intercept wire communications to and from the above-described telephones until communications are intercepted which reveal the full and complete identities of all co-conspirators, the manner in which the above-named persons and others as yet unknown participate in the interstate transmission of wagering odds and information, and the operation of an illegal gambling business and which reveal the identities of their confederates and their places of operation, or for a period of fifteen days from the date of this Order, whichever is earlier.

The Court's attention is invited to the fact that the telephone lines bearing numbers (214) 571-9106 and (214) 352-0252 are coin-operated telephones ostensibly available for public use. However, these telephones are primarily used by John Eli Stone in the conduct of the illegal gambling business to which this appliction for an interception order is applicable. Although the usual minimization procedures requiring the termination of an interception of conversations not involving these offenses will apply to interceptions from these phones, I propose the application of additional safeguards to minimize the interception of those communications whose interception is not authorized. Accordingly, I propose in addition to the usual minimization procedures that your Order provide that the agents of the Federal Bureau of Investigation monitor wire communications to and from the telephone lines bearing numbers (214) 351-9106 and (214) 352-0252 only when it has been determined by surveillance that John Eli Stone is within the premises in which the telephones are located and intercept such wire communications only when it has been determined by voice identification that John Eli Stone is a party to the conversation to be intercepted.

It is further requested that this Court issue an Order pursuant to the power conferred on it by Section 2518(4)(3) of Title 18, United States Code, directing that the Southwestern Bell Telephone Company, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities and

technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the Southwestern Bell Telephone Company to be compensated for by the applicant at the prevailing rates.

/s/ Harold S. Jaquet

HAROLD S. JAQUET, Asst.
United States Attorney
Northern District of Texas

Sworn to and subscribed before me this 20th day of November, 1973.

/s/ W.M. Taylor, Jr.

United States District Judge

In The United States District Court
For the Northern District of Texas
Dallas Division

In the Matter of Application of the United States for an Order Authorizing the Interception of Wire Communications

AFFIDAVIT

Robert M. Bryant, Special Agent, Federal Bureau of Investigation, Dallas, Texas, being duly sworn, states:

1. I am an investigative or law enforcement officer of the United States within the meaning of Section 2510 (7) of Title 18 United States Code — that is an officer of the United States who is empowered by law to conduct investigations of and to make arrests for offenses enumerated in Section 2516 of Title 18, United States Code. I have been a Special Agent with the Federal Bureau of Investigation for five years, of which the last three I have been assigned exclusively to investigating violations of the Federal Gambling Statutes.

2. This affidavit seeks authorization to intercept wire communications concerning offenses involving violations of Sections 1084, 1952, 1955, Title 18 United States Code, and Article 652.a, Section 1 of Texas Penal Code, and a conspiracy to commit the aforesaid offenses in violation of Title 18, United States Code, Section 371, which have been and are now being committed by John Eli Stone, Anthony Diadone, Eddie Haynes, James Peter Vouras, Isadore Max Miller, Gary "Buddy" Friarson, and others as yet unknown.

3. I have personally conducted the investigation of this offense and because of my personal participation in this investigation and of reports made to me by

other Agents of the Federal Bureau of Investigation, and officers of the Fort Worth and Dallas, Texas Police Departments, I am familiar with all the circumstances of the offenses. Based on this familiarity, I allege the facts contained in the paragraphs below to show that:

(1) The transmitting of bets, wagers, and/or information used in assisting in the placing of bets and wagers from one state to another and thence to other states is a violation of Title 18, United States Code, Sections 1084 and 1952. And further that the carrying on, operation and financing of a gambling business involving five or more persons for a period in excess of thirty days which grosses $2,000 or more in any single day is a violation of 18, United States Code, Section 1955, and Article 652.a Texas Penal Code. And finally that any illegal combination of persons to accomplish an end prohibited by any one of the three above-mentioned Sections of 18, United States Code, is a conspiracy prohibited by 18, United States Code 371.

(2) There is probable cause to believe that John Eli Stone, Anthony Paul Diadone, Isadore Max Miller, James Peter Vouras, Eddie Haynes, Gary Buddy Friarson and others as yet unknown have been, are now committing and will continue to commit offenses against the laws of the United States, that is:

(a) The above-named individuals and others as yet unknown are now and have been since May of 1972, engaged in a comprehensive gambling enterprise which receives the "line" and the "steam" or "hot" teams on a weekly basis from Las Vegas, Nevada, and then transmits the "line" to various gamblers in other cities in Texas and moreover, the above-named individuals take bets

from numerous unknown individual bettors and at the same time place bets for themselves and John Eli Stone based upon the "steam" teams. Steam teams are those which are considered by the odds makers to be the best team to bet on. Known co-conspirators operate generally in the following manner: Anthony Paul Diadone transmits the weekly line and the "hot" teams from Las Vegas, Nevada, to John Eli Stone in Dallas, Texas. John Eli Stone receives this information at either of two locations, Denny's Restaurant, Dallas, Texas, or his home on Pickwick Street in Dallas, Texas. John Eli Stone then transmits the "line" by either phone or word of mouth to Isadore Max Miller at Miller's home on Valleydale Drive, Dallas, Texas. Isadore Miller makes book for John Eli Stone at the Chateaubriand Restaurant with the aid and assistance of James Peter Vouras, also known as the "Greek", or at his residence located at 11144 B Valleyview Drive, Dallas, Texas, at telephone number (214) 363-5166. Stone also passes the line to James Peter Vouras. Gary "Buddy" Friarson, Eddie Haynes, and others yet unknown, who conduct bookmaking and money operations of their own. All of the individuals depend on John Eli Stone for information in which these bookmaking and money moving enterprises are carried on.

(b) The heart of this bookmaking operation is carried on at Denny's Restaurant, 3130 West Mockingbird. At this location, which is a one story structure, are located three telephones, they are (214) 351-5762, listed to J. E. Stone and Mary Lou Million, 3130 West Mockingbird, (214) 351-9106, which is a pay telephone located in the kitchen of Denny's Restaurant, and (214) 352-0252, which is a pay telephone located in the rear of the public dining area in a hallway of Denny's Restaurant. John Eli Stone also utilizes

telephone number (214) 368-0996, listed to Val May Stone, 8548 Pickwick, Apartment B, Dallas, Texas, and (214) 368-5905, also located at 8548 Pickwick, Apartment B, Dallas, Texas, is in the name of Mrs. H. H. Hensley.

(3) The above described illegal gambling business is also in violation of the laws of the State of Texas, Article 652.a, Section 1, Texas Annotated penal Code, and Dallas City Ordinance 30.81.

(4) There is probable cause to believe that telephone numbers (214) 351-9106, (214) 352-0252, and (214) 368-0996, are being used by John Eli Stone, Anthony Diadone, Eddie Haynes, James Peter Vouras, Isadore Max Miller, Gary Buddy Friarson, and others yet unknown, in carrying out the offenses detailed above, all of which appear more fully hereinafter.

Background Information
on Principle of Co-Conspirators

1. John Eli Stone is a white male, American, date of birth, 3/30/12, and according to the 1973 Dallas, Texas City Directory is listed as manager of Denny's Restaurant, located 3130 West Mockingbird. Stone resides at 8548 Pickwick, Apartment B, Dallas, Texas, with his wife, Val May Stone.

2. Anthony Paul Diadone, also known as Anthony Paul Daidone, is married to John Eli Stone's daughter, white male American, born 11/16/23, and resides at 1901 Beverly Way, Las Vegas, Nevada. Diadone is employed by the Stardust Hotel in Las Vegas, Nevada.

3. Isadore Max Miller, white male American, date of birth 10/9/12, old time professional

bookmaker, and known to Dallas, Texas police as partner of John Eli Stone since early 1960s.

4. Gary Buddy Friarson, white male American, date of birth, 6/23/38, has been employed as a nightclub owner and booking Agent for various talent in the Dallas area and is close associate of John Eli Stone.

5. James Peter Vouras, Sr., also known as the "Greek", white male American, date of birth, 9/4/11, is the owner and operator of the Chateaubriand Restaurant, 2515 McKinney, Dallas, Texas. He is a long time associate of John Eli Stone.

6. Edgar D. Haynes, also known as Eddie Haynes, white male American, date of birth, 3/27/26, Shamrock, Texas, is a close associate of John Eli Stone and sometime employee of Denny's Restaurant, 3130 West Mockingbird, Dallas, Texas.

FACTS AND CIRCUMSTANCES

4. On 8-8-66 Special Agent Lee Y. Murphy, IRS Intelligence told FBI Special Agent Harold J. Edgerton that on 7-24-66 at approximately 10:30 AM he (Murphy) was driving through the intersection of Webb Chapel Road and Northwest Highway, Dallas, Texas, when he saw John Eli Stone entering a public telephone booth located at that intersection. Because John Eli Stone had previously been investigated by IRS Intelligence, Murphy parked his car and stepped into the phone booth next to the phone booth occupied by John Eli Stone. Murphy saw John Eli Stone writing numbers and baseball teams in a small notebook. Murphy watched John Eli Stone take down what appeared to Murphy to be a "line" on baseball games for approximately six minutes at which time John Eli

Stone left the phone book and drove off. Murphy then obtained the number of the pay phone John Eli Stone had used (FL2-0047). Several days later Murphy checked the long distance tolls on FL2-0047; this check revealed that on 7-24-66 at approximately 10:30 AM, FL2-0047 had been used to call 735-8509 in Las Vegas, Nevada. A check of the telephone listing in Las Vegas, by Murphy revealed that 735-8509 was listed to one Anthony Diadone at 2675 Sherwood, Apartment 7, Las Vegas, Nevada.

5. During September, 1972, Detective Roy Lee Lowery of the Dallas Organized Crime Strike Force told affiant that he (Lowery) had conducted a surveillance of John Eli Stone during May and June, 1972, because he (Lowery) had received information that John Eli Stone was one of the major bookmakers and suppliers of "line" information in the Dallas area and that John Eli Stone received the "line" from Las Vegas by telephoning Las Vegas from the Dallas Airline Terminal located at Love Field. On 5-3-72, Lowery saw John Eli Stone enter Love Field at approximately 11:10 AM and walk to a pay telephone station located near the Delta concourse. Lowery saw John Eli Stone make two telephone calls from the pay phone and then leave the airport. Lowery then checked the phone from which John Eli Stone placed the two calls and determined the number to be (214) 352-0095.

On 5-10-72, Lowery observed one Isadore Max Miller, a person whom Lowery described as a close associate of John Eli Stone, enter the Love Field Terminal at approximately 10:55 AM and leave at approximately 11:40 AM.

On 5-17-72, Lowery saw John Eli Stone enter the Love Field Terminal at approximately 11:35 AM and leave at approximately 12:15 PM.

On 5-18-72, Lowery again saw John Eli Stone enter the Love Field Terminal at approximately 11:35 AM and walk down the Delta concourse. After shuffling about for a short time John Eli Stone walked to a group of public telephones located near Gate 29. Lowery saw John Eli Stone make several telephone calls from the number-two pay station.

On 5-19-72, Lowery saw John Eli Stone again enter the Love Field Terminal at approximately 2:08 PM and leave at approximately 2:40 PM.

On 6-3-72, Lowery saw John Eli Stone enter the Love Field Terminal at approximately 11:15 AM and walk straight to the Delta concourse where he used pay telephones numbered (214) 352-0216 and (214) 352-0095 to make several calls for approximately 15 minutes. Pursuant to a subpoena duces tecum Southwestern Bell Telephone Company furnished the toll records for (214) 352-0095 which reveal that on 6-3-72, (214) 352-0095 was used at 11:19 AM to place a call to (702) 735-8509 in Las Vegas, Nevada. A check of the telephone listings in Las Vegas reveals that on 6-3-72 (702) 735-8509 was listed to one Anthony Diadone, 1901 Beverly Way, Las Vegas, Nevada.

6. Detective Sgt. Roy Vaughn, Dallas Texas Police Department, currently assigned to the Dallas Organized Crime Task Force furnished affiant the following information on September 11, 1972.

On September 11, 1972, Sgt. Vaughn told affiant that he (Sgt. Vaughn) had been told by a confidential informant (S#1) that: During the early part of September, 1972, S#1 had a conversation with John Eli

Stone at Mr. Stone's restaurant in Dallas, Texas. During this conversation Mr. Stone told S#1 that he (Mr. Stone) was "bringing in" the "line" from Las Vegas on a weekly basis; that his source was his son-in-law, Anthony Diadone, who was employed by the Stardust Hotel.

During September, 1973, affiant and Sgt. Vaughn had a meeting to discuss John Eli Stone. During this meeting Sgt. Vaughn told affiant that S#1 had, during late August and early September, 1973, renewed contact with John Eli Stone and that during this 1973 contact John Eli Stone told S#1 that he still received the "line" from his son-in-law, Anthony Diadone of Las Vegas. S# stated that Mr. Stone told S#1 that Anthony Diadone furnished "line" information on a daily basis and furnished the "Hot Teams" or "Steam Teams." S#1 also stated that during the September, 1973, meeting he (S#1) had with Mr. Stone, Mr. Stone advised S#1 that Isadore Miller would be taking bets based on "his" line. S#1 was advised by Mr. Stone that Isadore Max Miller was to receive a percent of the net profit from the gambling business when the 1973 football season is over. John Eli Stone continued to describe his "business" by stating to S#1 that James Peter Vouras, sometimes known as "The Greek", was "moving money" for John Eli Stone. The term "moving money" means, according to S#1 that John Eli Stone will on a regular basis tell Jimmy "Greek" Vouras which teams to bet and then Vouras places bets with John Eli Stone's money.

S#1 stated to Sgt. Vaughn that according to Stone, generally on Tuesday, Vouras will "settle up" with Stone. S#1 has been a confidential informant of Sgt. Vaughn for two years and has furnished high level

criminal intelligence during that time. Information furnished by S#1 has, in the past, led to arrests of three Dallas bookmakers. Sgt. Vaughn has investigated all information given him by S#1 and has never found of it to be false.

7. A confidential informant who for the purpose of this affidavit will be identified as S#2 advised FBI SA F. Vincent Cesare of the Dallas Office, who in turn advised your affiant the following: On October 12, 1972, S#2 told SA Cesare that he (S#2) had, during early October, 1972, placed a number of bets with John Eli Stone by phoning (214) 368-0996. S#2 stated that at that time John Eli Stone demanded a minimum bet of at least $200.00. On October 12, 1972, S#2 told SA Cesare that in order to "settle up" with John Eli Stone, S#2 went to Stone's restaurant on West Mockingbird in Dallas, Texas, to pay Stone the money he owed him. S#2 is a bettor, especially on football games and has furnished reliable information on six past occasions during the last 13 months, which has been verified by independent investigation by the FBI. Further, S#2 has been a businessman in the Dallas community for three years and enjoys a good reputation for being a truthful person.

8. A confidential informant who for the purpose of this affidavit will be known as S#3 has advised affiant of the following: On November 3, 1972, S#3 told affiant that John Eli Stone was receiving the moves on the hot teams from his son-in-law, Anthony Diadone of Las Vegas, Nevada. S#3 further stated that he (S#3) was present at the Denny's Restaurant located on West Mockingbird Lane in Dallas, Texas, on the weekend of October 28, 1972, when John Eli Stone answered a telephone call which Stone stated was from Anthony

Diadone and received that weekend picks from Diadone. S#3 further stated that, according to Stone, Isadore Max Miller handles the bookmaking end of Stone's gambling business. S#3 further advised affiant that Stone had approximately twenty bettors and that these twenty bettors placed their bets with Isadore Max Miller. These bettors, S#3 has observed, settle up with Miller at either the Denny's Restaurant or at the Chateaubriand Restaurant, a Dallas restaurant owned by Jimmy "Greek" Vouras and a place frequented by gamblers, con-men and criminal defense and a place frequented by gamblers, con-men and criminal defense attorneys. S#3 further advised affiant that he (S#3) had seen numerous individuals whom he (S#3) knew to be gamblers, come into Stone's restaurant and "settle up" with either Stone or Miller. S#3 further stated that John Eli Stone told S#3 that Isadore Miller receives 25 percent of the net profit of the bookmaking operation they (Stone and Miller) run.

On January 15, 1973, S#3 advised affiant that John Eli Stone had told S#3 during the week of January 8, 1973, that he was still receiving the "line" from Anthony Paul Diadone of Las Vegas on basketball games and that Stone told S#3 that he would bring in a baseball line for a few selected plays.

On April 26, 1973, S#3 told affiant that John Eli Stone had told S#3 during the week of April 22, 1973 that he (Stone) was going to Las Vegas to see his son-in-law, Anthony Paul Diadone, who Stone indicated, is conducting a bookmaking operation out of his (Diadone's) pocket. S#3 further advised Affiant that he (S#3) had seen John Eli Stone booking bets on baseball games and betting the "hot" teams, which he (Stone)

received from Diadone during the week of April 26, 1973. S#3 went on to state that according to Stone, Jimmy "Greek" Vouras and Gary "Buddy" Friarson were "moving" money for Stone on baseball games.

On August 9, 1973, S#3 told affiant that John Eli Stone had gone to Dallas Love Field Airport at approximately 11:30 a.m. during the week of August 6, 1973, where he (Stone) received the baseball and football lines at the public telephone booths in the main lobby at Love Field. S#3 advised that John Eli Stone had told S#3 this information.

On September 5, 1973, S#3 told affiant that John Eli Stone had told S#3 during the week of September 1, 1973 that Isadore Max Miller was going to handle the bookmaking end of Stone's gambling business. During the week of September 1, 1973, S#3 advised the affiant that John Eli Stone had told him that he (Stone) was now reviewing the daily football line from Anthony Paul Diadone at his restaurant over one of the pay phones. S#3 stated that he had observed John Eli Stone receive line information on telephone number (214) 352-0252, during the week of September 1, 1973. S#3 further stated that Stone had told S#3 that Isadore Max Miller was sitting on the phones "taking bets from bettors" at his residence at telephone number (214) 363-5166. S#3 further advised affiant that John Eli Stone told S#3 that Miller receives 25 percent of the net profit from the gambling business for running Stone's book.

On September 27, 1973, S#3 advised affiant that as a result of being in the Denny's Restaurant when the line and the hot teams came in, and of talking with John Eli Stone, he (S#3) had learned that as of September 27, 1973, Jimmy "Greek" Vouras, Gary

"Buddy" Friarson, Eddie Haynes and several individuals S#3 was not familiar with were all "moving money" for John Eli Stone within the last 24 hours.

On October 11, 1973, S#3 advised the affiant that within the last 24 hours, S#3 had been in Denny's Restaurant and seen John Eli Stone go to the rear of Denny's Restaurant and answer pay telephone number (214) 351-9106. Stone then returned and stated to S#3 that he had just gotten the line from Anthony Paul Diadone. Stone stated to S#3 that the line and hot teams comes in daily over either number (214) 351-9106 or (214) 352-0252. S#3 further stated that according to Stone, Isadore Miller continues to run Stone's bookmaking operation from Miller's home phone which S#3 gave as (214) 363-5166. S#3 advised affiant that according to Stone, that money moving operation end of Stone's gambling business, which S#3 had been told is still in operation since Jimmy "Greek" Vouras, Eddie Haynes and Gary "Buddy" Friarson are presently betting Stone's money.

S#3 advised the affiant on October 21, 1973 that S#3 had called John Eli Stone at telephone number (214) 368-0996 for the "hot" teams. Stone told S#3 that the college steam teams were Pittsburgh, Howard, Air Force, Brown and North Carolina. S#3 was called by Stone on October 21, 1973 and advised that Cincinnati and San Francisco were hot teams in the pros.

S#3 advised the affiant on November 1, 1973 that he had called Stone during the week of October 22, 1973 at (214) 368-0996 and received the following teams: Jets/Denver, Dallas/Philadelphia, Pittsburgh/Cincinnati, and San Francisco/Atlanta.

S#3 advised the affiant he had contacted Stone twice on October 29, 1973 at telephone number (214) 351-9106 and (214) 352-0252, and received Buffalo as the hot team in the game with the Kansas City Chiefs, and also received Cincinnati as the hot team in the game on November 4, 1973 with Dallas.

S#3 advised the affiant on November 1, 1973 that the following people are moving money for the Stone-Miller operation:

1) Eddie Haynes
2) Jimmy Vouras
3) Gary "Buddy" Friarson

S#3 advised he knows these individuals are moving money for Stone and Miller because John Eli Stone has told him this on numerous occasions and as recently as October 30, 1973.

S#3 further advised your affiant on November 1, 1973 that S#3 had been told by John Eli Stone on October 29, 1973 that Stone still is receiving the Diadone line from Las Vegas, Nevada over the pay phone at Denny's restaurant.

On November 1, 1973, S#3 advised affiant that S#3 estimated the total handle of the Stone-Miller bookmaking operation to be at $250,000 per week during peak of football season.

On November 5, 1973, S#3 advised your affiant that on November 4, 1973 he had called Stone at telephone number (214) 368-0996 and John Eli Stone gave S#3 several hot teams.

I believe S#3's information concerning Stone's gambling business to be reliable because S#3 has been an FBI informant for five years and during that time he has furnished information which has led to the

arrest of eleven bookmakers on Federal charges and has contributed to the arrest of sixteen bookmakers on municipal charges. S#3 has been and remains a close personal friend of John Eli Stone. Moreover, the long distance toll records (both to be shown later) show that a large number of calls leave the Denny 's Restaurant for Las Vegas. I believe much of the information given by S#3 in the past has been corroborated by independent investigation.

9. On November 27, 1972, a confidential informant (S#4) advised affiant that he (S#4) bets with Isadore Max Miller, who, S#4 described as an agent of John Eli Stone. S#4 advised that he (S#4) bets with Miller by calling him at (214) 363-5166 and by settling up with Miller on Tuesdays at the Chateaubriand Restaurant on McKinney Street in Dallas, Texas. S#4 further advised that he would, from time to time leave an envelope containing cash at the Chateaubriand with Jimmy "Greek" Vouras.

On August 21, 1973, S#4 told affiant that he (S#4) had phoned Isadore Max Miller at (214) 363-5166 during the weekend of August 18, 1973 and had placed bets with Miller on the pro football games and that on August 20, 1973, the following Monday, S#4 had left his losings at the Chateaubriand Restaurant with Jimmy Vouras. S#4 further advised that he, S#4, had been put on as a player with Miller by Vouras, the owner of the Chateaubriand Restaurant and had been betting with Miller for over a year and that on at least one occasion he (S#4) had settled up with John Eli Stone at Stone's restaurant on Mockingbird Lane for the bets he had made with Isadore Max Miller.

On September 24, 1973, S#4 advised that he (S#4) had within the last 48 hours placed six bets ranging from

$200 to $500 per game with Isadore Max Miller by phoning Miller on (214) 363-5166.

On October 16, 1973, S#4 stated that he (S#4) had placed a bet on the Cowboys-Redskins football game played on October 8, 1973 with Isadore Miller by phoning Miller on (214) 363-5166 and that he (S#4) had settled up with Jimmy Vouras at the Chateaubriand Restaurant.

I believe the information which S#4 has furnished the affiant as he has been an informant for the FBI for over a year and has furnished information on ten occasions which always proved to be truthful by independent investigation.

10. On January 29, 1973, affiant had a conversation with a person (S#5) who stated that within the past week Isadore Max Miller had told S#5 that he (Miller) had been John Eli Stone's phoneman for the 1972 football season and had received 25 percent of the net profit from Stone's business which had amounted to $360,000.

During the month of August, 1973, I had another conversation with S#5 at which time S#5 told affiant that Isadore Max Miller told S#5 that he (Miller) was again working for Stone on a 25 percent of the profits basis for the 1973 football season and that Miller had told S#5 that Stone would get the line from Anthony Paul Diadone of Las Vegas.

I believe S#5's information to be reliable because independent investigation of much of the information S#5 has given in the past has shown the information to be truthful. S#5 has given information which has led to the arrest of five bookmakers on Federal charges. I believe S#5 to be credible because he is a rather small-

time bookmaker who would be in a position to associate himself with others like himself.

11. On September 26, 1973, an individual (S#6) had a conversation with Stan Pruitt of the Ft.Worth Metro Squad. Mr. Pruitt in turn told FBI SA Ronald K. Jannings who relayed S#6's information to affiant. On September 26, 1973, S#6 stated that S#6 had been told by Stone that Stone and Miller were operating a bookmaking business out of Stone's restaurant. This business, S#6 stated, was run by Stone and Miller by Stone's receiving the "line" from Anthony Paul Diadone, Stone's son-in-law who is employed by the Stardust Hotel in Las Vegas. Diadone, S#6 went on to state, is also responsible for providing the steam to Stone and Stone in turn relays the steam and the line to Ft. Worth, Texas. S#6 stated that Stone told S#6 that he (Stone) was lucky to have a son-in-law in Las Vegas because if there was so much as one-point change in Las Vegas Stone would get a call and that if there was something "wrong" he (Stone) would likewise be advised by Diadone. By "wrong" S#6 explained, was meant that if any of the pro football games were fixed or any of the referrees had been bribed, Stone would find out about it. S#6 further stated that he, S#6, had been inside Stone's restaurant several times during the past three weeks and had seen Stone using the pay phones to receive the line and make book. S#6 stated that business was so brisk that Stone would get caught between phones and have to switch from one to the other.

I believe S#6 to be credible and reliable because Stan Pruitt of the Ft. Worth Police, has indicated to me that

S#6 has given the Ft. Worth Police information in the past which has proven to be true and correct. Further, I know S#6 to be a gambler who has, in the past, associated with John Eli Stone. Moreover, S#6's information is corroborated by the observations (see below) of FBI SA Crillon C. Payne, II.

12. On October 22, 1973, FBI SA Crillon C. Payne, II told affiant that he had entered the Denny's Restaurant at approximately 10:00 a.m. on October 20, 1973 and stayed until approximately 10:30 a.m. During that time (214) 352-0252, a pay phone, and (214) 352-5762, a house phone, were ringing constantly. During this time they would be answered by various individuals, who would state that Stone was not in. On October 21, 1973, Sunday, Payne again entered Stone's restaurant at approximately 9:30 a.m. and saw John Eli Stone and Eddie Haynes all answering the two way pay phones and the restaurant phone, (214) 351-5762. All three phones were, Payne states, ringing constantly. Payne overheard some unknown individual state to Stone, "I want to put a 1,000 on Oakland." However, Stone's response was not overheard as he (Stone) had to answer one of the pay phones before he could answer the unknown individual. At approximately 10:00 p.m., Stone left the restaurant and as he was leaving, Payne overheard him say, "Somebody be sure and get those phones." At approximately 10:30 p.m., Payne saw one of the waitresses answer one of the phones and Payne overheard the following:

Unknown Waitress: "I said this was Denny's."
"No, he's not here."

13. The records of Southwestern Bell Telephone show (214) 351-5762 subscribed to J. E. Stone and Mary

Lou Million and located at Denny's Restaurant, 3130 W. Mockingbird Lane, Dallas, Texas. A review of all of the long distance calls from (214) 351-5762 shows the following: From June 1, 1973 to September 29, 1973, (214) 351-5762 was used to place long distance calls. Twenty were to (702) 735-8509 in Las Vegas, Nevada, show (702) 735-8509 to be subscribed to Anthony Diadone.

The records of Southwestern Bell Telephone show (214) 351-9106 to be a public pay telephone located inside the Denny's Restaurant, 3130 W. Mockingbird Lane, Dallas, Texas. A review of the long distance tolls from (214) 351-9106 shows: From June 13, 1973 to September 19, 1973, 45 long distance calls were made from (214) 351-9106; 12 were to the Diadone number in Las Vegas.

The records of Southwestern Bell, Dallas, show (214) 352-0252 listed as a public telephone located inside Denny's Restaurant, 3031 W. Mockingbird Lane, Dallas, Texas. A review of the long distance tolls from (214) 352-0252 shows: From June 4, 1973 to September 11, 1973, (214) 352-0252 was used to make long distance calls; 15 of the 152 long distance calls were to the Diadone number in Las Vegas.

The three phones located in the Denny's Restaurant on Mockingbird Lane were used to place approximately 269 long distance calls, 59 of which were to the Diadone number in Las Vegas.

The records of Southwestern Bell Telephone show two telephones installed at 8548 Pickwick, Apartment B, Dallas, Texas (Stone's residence). (214) 368-0996 is subscribed to in the name of Val May Stone and located at 8548 Pickwick, Apartment B, Dallas. (214) 368-5905 is subscribed to in the name of one Mrs. H. H.

Hensley, 8548 Pickwick, Apartment B, Dallas. The long distance tolls of (214) 368-0996 reflect that between May 10, 1973 and September 26, 1973, 42 long distance calls were placed, 15 of which were to the Diadone number in Las Vegas, Nevada. The long distance tolls of (214) 368-0996 from June 8, 1973 to August 6, 1973 reflect: 13 long distance calls, two of which were to the Diadone number.

The records of Southwestern Bell Telephone Company, Dallas, Texas, reflect that (214) 363-5166 is subscribed to in the name of Isadore Miller, 11144B Valleydale Drive, Dallas, Texas 75230.

The above information was furnished by Mrs. Katy Halford, Office of the Area Security Manager, Southwestern Bell Telephone Company, Dallas, Texas, pursuant to a subpoena duces tecum dated May 29, 1973.

14. The records of the FBI show the following arrests for the individuals named above:

ISADORE MILLER — arrested 1938 for "betting on horse racing;" August 13, 1949 arrested for vagrancy; November 20, 1964 arrested for accepting wagers without a Federal stamp; on April 2, 1965 sentenced to 30 days — $5,000 fine and one year probation.

JOHN ELI STONE — On March 28, 1929 arrested for "operating a con game;" November 16, 1929 arrested for swindling; July 23, 1930 arrested for "being a fugitive from justice;" February 13, 1934 arrested in a gambling investigation; April 4, 1938 arrested for felony theft; August 7, 1943 arrested for gambling — $12 fine; November 8, 1946. December 2, 1961 arrested for bookmaking; June 29, 1963 arrested accepting wagers without a Federal stamp; convicted September 24, 1964 —

sentenced to $6,000 — three years probation and 60 days.

ANTHONY PAUL DIADONE — no arrests.

JAMES PETER VOURAS — On November 6, 1964, arrested accepting wagers without tax stamp; 30 days to serve — $4,000 fine — three years probation.

EDDIE HAYNES — no arrests.

GARY FRIARSON — no arrests.

15. No previous applications are known to have been made to judges of competent jurisdiction for authorization to intercept or for approval of interception of wire or oral communications involving any of the same persons, facilities or places specified herein.

16. Surveillances conducted during the past three months show that John Eli Stone lives at 8548 Pickwick, Apartment B, Dallas, Texas. Affiant has seen Stone over the past few months at least twice a week and based on these observations it may be said that Stone divides his time between the Pickwick address and the Denny's Restaurant located at 3031 West Mockingbird Lane, Dallas, Texas. Surveillances conducted by affiant and FBI SA F. Vincent Cesare indicate that Isadore Max Miller lives at 11144B, Valleydale Drive, Dallas, and divides his time between the Valleydale address, Stone's restaurant and the Chateaubriand Restaurant located at 2515 McKinney, Dallas, Texas.

17. Conventional methods of investigation are not likely to achieve success. None of the confidential informants named in this affidavit are willing to testify against any of the co-conspirators.

18. Wherefore, affiant believes that probable cause exists to believe that Anthony Paul Diadone, John Eli Stone, Isadore Max Miller, James Peter Vouras, Eddie Haynes, Gary Friarson and others yet unknown and unidentified have been, are presently and will continue in the future (1) to transmit and cause to be transmitted over the telephone wagering odds and wagering information from Las Vegas, Nevada, to Dallas, Texas, in violation of 18 USC 1084; and (2) to conduct and finance and manage a gambling business in violation of 18 USC 1955 and Article 652a Texas Penal Code; and (3) to travel between the State of Nevada and the State of Texas for the purpose of transporting the proceeds of an illegal gambling business, in violation of 18 USC 1952 and (4) to conspire, combine and enter into an illegal agreement among themselves and others to violate the above three laws, in violation of 18 USC 371. Affiant further believes that the telephones, numbered and listed below have been, are presently and will continue in the future to be used, as described above, in connection with the above outlined offenses.

(214) 352-9106 subscribed as a pay phone located at Denny's Restaurant, 3031 West Mockingbird Lane, Dallas, Texas.

(214) 352-0252 subscribed as a public telephone located at Denny's Restaurant, 3031 West Mockingbird Lane, Dallas, Texas.

(214) 368-0996 subscribed as Val May Stone, 8548 Pickwick, Apartment B, Dallas, Texas.

19. My experience and the experience of other Agents has shown even though gambling "customers" are identified, they are unwilling to furnish information to law enforcement Agents or

officials inquiring into gambling activities. This is even more true when the "customer is a professional gambler himself and is requested to give information concerning a gambling operation. Experience has further established that even though telephone toll records are available, which may suggest a person is engaged in illicit gambling, the records themselves are not sufficient to prove the gambling activities. Standard investigative techniques have not succeeded in providing evidence to sustain prosecution in this case and would only succeed to a limited degree in establishing that John Eli Stone and Anthony Paul Diadone and others are involved in gambling activities on the telephone. Furthermore, such investigative techniques as physical surveillance and examination of the records obtainable on John Eli Stone and Anthony Diadone offer little probability of success in securing presentable evidence. Based upon my knowledge and experience as a Special Agent of the FBI in the investigation of gambling cases and my association with other Special Agents who have conducted investigations of gambling activities, normal investigative procedures reasonably appear to be unlikely to succeed in establishing that John Eli Stone and Anthony Diadone and others as yet unknown are involved in gambling activities on the telephone in violation of Federal laws. My experience and the experience of other Agents have shown that gambling raids and searches of gamblers and their gambling establishments have not, in the past, resulted in the gathering of physical or other evidence to prove all elements of the offenses. I have found that through my experience and the experience of other Special Agents, who have worked on gambling cases, that other gamblers frequently do

not keep permanent records. If such records have been maintained, gamblers, immediately prior to or during a physical search, sometimes destroy these records. Additionally, records that have been seized in the past gambling cases have generally not been sufficient to establish the elements of Federal offenses, because such records are difficult to interpret and many times are of little or no significance without further knowledge of the gambler's activity. Further, informants who have furnished information in this affidavit concerning the gambling activities of John Eli Stone and Anthony Paul Diadone and others will not testify because they fear for their lives. Therefore, the interception of these telephone communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to prove violations of these statutes.

20. Conventional methods of law enforcement are likely to fail; and affiant is of the belief that communications of the above-named persons concerning these offenses will be obtained through the interception for a period of 15 days, authorization for which is applied for herein, as normal investigative procedures have proven unsuccessful.

/s/ Robert M. Bryant

Robert M. Bryant,
Special Agent, FBI

Sworn to and subscribed to before me this 20th day of November, 1973.

/s/ W. M. Taylor, Jr.

U.S. District Judge

APPENDIX F

In the United States District Court
for the Northern District of Texas
Dallas Division

In the Matter of the Application
of the United States for an Order
Authorizing an Interception
of Wire Communications

Report

During the first five days of interception numerous interceptions of a local and interstate nature regarding transportation of wagering odds in the conduct of an illegal gambling business were made.

One unauthorized interception was made from one of the public telephones at the Denny's Restaurant on Mockingbird Lane. Said interception took place when voice identification between the person intercepted and that of Mr. John Eli Stone proved to be very much alike. The Court's attention is invited to the fact that the defendant, Stone, was present in the residence when said interception was made.

FRANK D. McCOWN
United States Attorney
/s/ Harold S. Jaquet
HAROLD S. JAQUET, Assist.
United States Attorney

In the United States District Court
for the Northern District of Texas
Dallas Division

In the Matter of the Application
of the United States for an Order
Authorizing an Interception
of Wire Communications

REPORT

During the second five days of interception of the numbers referred to in the Court's Order, numerous interceptions concerning illegal gambling and the interstate transportation and travel of gambling information and persons were intercepted.

During the second five-day period there was the apparent unauthorized interception from one of the phones listed in the Court's Order. Said interception was of one Anthony Diadone while he was present at Denny's Restaurant on Mockingbird Lane. The facts surrounding this unauthorized interception are as follows: Mr. Stone, the target defendant, was present in the restaurant and used the telephone. He then gave the telephone to Anthony Diadone who continued a conversation Mr. Stone had initiated. The Court's attention is invited to the fact that the defendant, Mr. Stone, was in fact present in the restaurant and his voice was identified on the telephone and therefore the two pre-conditions to interception have been satisfied.

Numerous calls from unidentified sources have

been intercepted on all phones. These sources either placed bets or requested the line from one of the targeted defendants.

WHEREFORE, the government prays that the Court allow interception on all phones to continue for five more days.

FRANK D. McCOWN
United States Attorney
/s/ Harold S. Jaquet
HAROLD S. JAQUET, Assist.
United States Attorney

In the United States District Court
for the Northern District of Texas
Dallas Division

In the Matter of the Application
of the United States for an Order
Authorizing an Interception
of Wire Communications

REPORT

During the final five days of authorized interception, numerous interceptions of an interstate nature were obtained. These interceptions indicate that wagering odds and information were transported from Dallas, Texas, to Oklahoma and perhaps other states.

This information was transmitted to Dallas from Las Vegas, Nevada. All interception has stopped. At this particular time application is being made for one extension and three separate and distinct authorizations.

FRANK D. McCOWN
United States Attorney
/s/ Harold S. Jaquet
HAROLD S. JAQUET, Assist.
United States Attorney

APPENDIX G

OFFICE OF THE ATTORNEY GENERAL
Washington, D. C. 20630

Special Designation of Assistant Attorney General In Charge of the Criminal Division to Authorize Applications for Court Orders Authorizing Interception of Wire or Oral Communications

Order No. 548-73

By virtue of the authority vested in me by 28 U.S.C. 509, 510, 5 U.S.C. 301, and 18 U.S.C. 2516, I hereby specially designate the Assistant Attorney General in charge of the Criminal Division to exercise the power conferred by Section 2516 of Title 18, United States Code, to authorize applications to a Federal judge of competent jurisdiction for orders authorizing the interception of wire or oral communications by the Federal Bureau of Investigation or a Federal agency having responsibility for the investigation of the offense as to which such application is made, when such interception may provide evidence of any of the offenses specified in Section 2516 of Title 18, United States Code.

/s/ Robert H. Bork
Acting Attorney General

October 23, 1973

APPENDIX H

Portions of Chapter 119
Wire Interception and Interception
of Oral Communications

TITLE 18

§2515 Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communications has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

§ 2516 Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal Judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the

offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprise), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate

shipment), section 664 (embezzlement from pension and welfare funds), section 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassinations, kidnaping and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) Any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State or principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge grant in conformity with section 2518 of this chapter an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such

interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Added Pub.L. 90-351, Title III, §, *June 19, 1968, 82 Stat. 216, and amended Pub.L. 91-452, Title VIII,* §IX, §902(a), Title XI, § 1103, Oct. 15, 1970, 84 Stat. 940, 947, 959; Pub.L. 91-644, Title IV, § *16, Jan. 2, 1971, 34 Stat. 1891.*

§ 2518 Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement oficer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the

nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the Judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish

additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that —

(a) there is probable cause for belief that an individual is commiting, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify —

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the

authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that —

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial

activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication of an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminte when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings

shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or

extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of cometent jurisdiction the serving of the inventory required by this subjsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above

information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the

United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Added Pub.L. 90-351-Title III, § 802, June 19, 1968, 82 Stat. 218 and amended Pub.L. 91-358, Title II, § 211(b), July 29, 1970, 84 Stat. 654.

APPENDIX I

Title 18, United States Code, Section 1955 Prohibition of Illegal Gambling Business

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section —

(1) "illegal gambling business" means a gambling business which —

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business;

and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a

gambling business and such business operates for two or more successive days then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an

organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Added Pub.L. 91-452, Title VIII, § 803(a), Oct. 15, 1970, 84 Stat. 937.

Supreme Court, U. S.
FILED
FEB 8 1978
MICHAEL RODAK, JR., CLERK

Nos. 77-690, 77-724, and 77-5730

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN ELI STONE, RICHARD CARL BIGGS,
JOHN DAYTON RITTER and
JAMES WILLIAM WINNINGHAM, PETITIONERS

v.

UNITED STATES OF AMERICA

REUBEN GOLDSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY DAIDONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
ANDREW GORDON,
Attorneys,
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Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-690
JOHN ELI STONE, RICHARD CARL BIGGS,
JOHN DAYTON RITTER and
JAMES WILLIAM WINNINGHAM, PETITIONERS
v.
UNITED STATES OF AMERICA

No. 77-724
REUBEN GOLDSTEIN, PETITIONER
v.
UNITED STATES OF AMERICA

No. 77-5730
ANTHONY DAIDONE, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-14)[1] is reported at 558 F. 2d 775.

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[1]"Pet. App." refers to the appendix to the petition in No. 77-690.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1977. A petition for rehearing filed by all petitioners was denied on October 14, 1977. The petitions in No. 77-690 and No. 77-5730 were filed on Monday, November 14, 1977; the petition in No. 77-724 was filed on November 11, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an Acting Attorney General may designate an Assistant Attorney General to authorize applications for orders permitting electronic surveillance (Pet. No. 77-690 only).

2. Whether the application for the intercept order in this case sufficiently established that other investigative methods were inadequate.

3. Whether the evidence derived from the electronic interception must be suppressed because of the issuing judge's failure personally to date the intercept order at the time the order was issued.

4. Whether the interception was conducted in conformity with the order (Pets. No. 77-690 and 77-5730).

5. Whether the evidence derived from the interception must be suppressed because of a brief delay in sealing the tapes of the intercepted conversations (Pet. No. 77-690 only).

6. Whether the evidence against petitioner Goldstein derived from the interception must be suppressed because the court was not informed that his conversations had been intercepted (Pet. No. 77-724 only).

STATEMENT

Following a jury-waived trial in the United States District Court for the Northern District of Texas, petitioners Stone, Goldstein, Daidone, Ritter and Winningham were convicted of using interstate communication facilities for the transmission of bets, wagers, and information concerning sporting events, in violation of 18 U.S.C. 1084 (Count 5). Petitioners Stone and Biggs were convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955 (Count 1).[2] Petitioners were sentenced as follows. Stone: consecutive terms of three years' imprisonment for Count 1 and two years' imprisonment for Count 5, and a fine of $10,000. Goldstein: two years' imprisonment (to run consecutively to a sentence imposed in another case) and a $10,000 fine. Daidone: 13 months' imprisonment. Ritter: two years' imprisonment and a $5,000 fine. Winningham: a $10,000 fine. Biggs: a $10,000 fine.

The case was submitted on the basis of stipulated evidence, a large part of which consisted of telephone conversations intercepted pursuant to a court order. The sufficiency of the evidence is not in dispute, and petitioners' convictions stand or fall with the propriety of the district court's refusal to grant their motions to suppress the evidence derived from the interception.

On November 20, 1973, Judge Taylor of the United States District Court for the Northern District of Texas authorized the interception by the government of calls to and from petitioner Stone's private telephone and two public pay telephones located in Stone's restaurant (Pet.

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[2]The remaining counts were dismissed at the request of the prosecutor.

App. A-17 to A-21).[3] The order authorized interception for 15 days from its date (*id.* at A-21). Although Judge Taylor did not date the order, Assistant United States Attorney Harold Jacquet testified that immediately after the order was signed he took it to the clerk's office, where it was date-stamped and filed (C.A. App. 123-125).[4]

In order to protect the privacy of innocent persons who might use the two public telephones, the order provided that conversations on those telephones could be monitored only when it was determined by surveillance that Stone was in the restaurant, and that conversations could be intercepted only when Stone was identified as a party (Pet. App. A-20). Conversations were intercepted from November 20, 1973, through December 4, 1973 (Pet. No. 77-690, p. 5).

During the course of the interception, three five-day reports summarizing the results of the interception and describing unauthorized interceptions were submitted to Judge Taylor (Pet. App. A-52 to A-55). The original tape recordings of the intercepted conversations were presented to Judge Taylor for sealing on December 17, 1973 (Pet. No. 77-690, p. 6), thirteen days after the termination of the interceptions.

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[3]The United States Attorney was authorized to apply for the interception order by Henry E. Petersen, the Assistant Attorney General in charge of the Criminal Division of the Department of Justice (Pet. App. A-18 to A-19). Acting Attorney General Robert H. Bork had designated Mr. Petersen to authorize applications for the interception of wire communications (Pet. App. A-56).

[4]"C.A. App." refers to petitioners' consolidated appendix in the court of appeals.

ARGUMENT

1. Petitioners in No. 77-690 contend that the intercept order was invalid because the Assistant Attorney General who authorized the application was designated by Acting Attorney General Bork instead of the Attorney General, as provided in 18 U.S.C. 2516(1).[5] This claim is insubstantial.

The courts of appeals that have addressed this question have uniformly held that Acting Attorney General Bork had all the powers of the Attorney General, including the authority to designate an Assistant Attorney General to authorize applications for intercept orders. *United States* v. *McCoy*, 539 F. 2d 1050 (C.A. 5); *United States* v. *Guzek*, 527 F. 2d 552 (C.A. 8); *United States* v. *Pellicci*, 504 F. 2d 1106 (C.A. 1), certiorari denied, 419 U.S. 1122. These decisions recognize that the congressional requirement that the officer ultimately responsible for authorizing electronic surveillance be politically responsive (*United States* v. *Giordano*, 416 U.S. 505, 520 n. 9) is satisfied here because Acting Attorney General Bork, who was Solicitor General prior to becoming Acting Attorney General, was nominated by the President and confirmed by the Senate (28 U.S.C. 505).[6] 28 U.S.C. 508(b)

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[5]18 U.S.C. 2516(1) provides in pertinent part:

> The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications * * *.

[6]*United States* v. *Acon*, 513 F. 2d 513 (C.A. 3), on which petitioners rely, suggested that the Attorney General could not designate an Acting Assistant Attorney General to pass on applications for intercept authorizations because an Acting Assistant

authorized Solicitor General Bork to assume all of the duties of the Attorney General while that office was vacant, and there is no reason to conclude that he lacked the authority to designate an Assistant Attorney General to authorize intercept applications.

2. Petitioners contend that the application for the intercept order did not sufficiently explain why other investigative techniques were inadequate.[7]

18 U.S.C. 2518(1)(c) requires the application and accompanying affidavit to contain a "full and complete statement" why other investigative techniques are inadequate. The requirements of Section 2518 (1)(c) are satisfied when an affidavit, read in a practical and common sense fashion (see S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)), shows a sufficient factual basis from which the issuing authority can reasonably conclude that electronic surveillance is necessary to obtain evidence for the successful prosecution of persons known to be involved in the activities under investigation, or is necessary to ascertain the full scope of their activities and identify the participants. See, *e.g.*, *United States* v. *Turner*, 528 F. 2d 143, 152 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996; *United States* v. *Steinberg*, 525 F. 2d 1126, 1129-1131 (C.A. 2), certiorari denied, 425

Attorney General, not having been nominated and confirmed, did not meet the test of political responsiveness (513 F. 2d at 516). In contrast, here both the Acting Attorney General and the Assistant Attorney General who approved the government's application had been nominated by the President and confirmed by the Senate (28 U.S.C. 506). Thus both officials met the "political responsiveness" test.

[7] 18 U.S.C. 2518(1)(c) provides that every application for an interception order shall include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

U.S. 971; *United States* v. *De La Fuente*, 548 F. 2d 528, 537-538 (C.A. 5); *United States* v. *Jackson*, 549 F. 2d 517, 536-537 (C.A. 8).

The court of appeals correctly concluded that the affidavit here (see Pet. App. A-29 to A-51) provided such a factual basis (*id.* at A-4 to A-6). The affidavit of Agent Bryant accompanying the application clearly indicates that the informants, who were familiar with the gambling operation and who had provided useful information, were afraid to testify. This factor strongly indicates the propriety of interceptions (see *United States* v. *Alfonso*, 552 F. 2d 605 (C.A. 5); *United States* v. *Feldman*, 535 F. 2d 1175 (C.A. 9)).

The affidavit also detailed the results of several months of physical surveillance, which disclosed that petitioner Stone, the experienced gambler who was in charge of the operation (Pet. App. A-47, A-48), was careful to conceal his operations, evidently using various public telephones in the Dallas area to conduct his gambling business (*id.* at A-33, A-35). One of the public telephones at the restaurant was in the kitchen, making physical surveillance impractical (*id.* at A-31). Moreover, physical surveillance at the restaurant during the time it was open had been tried and found ineffective (*id.* at A-45). Although a search of telephone company toll records confirmed that many calls from the target phones had been placed to petitioner Daidone's number in Las Vegas (*id.* at A-46), this was insufficient to establish violations of Sections 1084 and 1955.

In addition to the facts outlined above, the affidavit detailed the conclusions of Agent Bryant that, based on his familiarity with how gambling operations are conducted, further use of conventional investigative techniques would prove unavailing (Pet. App. A-48 to A-51). As he pointed out, a physical search of the premises,

although possibly yielding some of the records of the organization, would not produce sufficient evidence to convict, because gambling records are often cryptic and incomplete. Physical surveillance is generally unproductive where, as here, most of the gambling business is conducted over the telephone. Moreover, because of the location of the telephones, the agents at the restaurant could not overhear significant conversations without disclosing their interest.

The affidavit in this case thus contained more than the conclusory allegations found insufficient in *United States* v. *Kalustian*, 529 F. 2d 585 (C.A. 9), relied on by petitioners.[8] The mere fact that an affidavit contains conclusions by the affiant based on his experience with the type of criminal activity under investigation is not fatal, so long as the conclusions are supplemented with facts sufficient to indicate that electronic surveillance is not being used as the first step in the investigation. *United States* v. *Landmesser*, 553 F. 2d 17 (C.A. 6); *United States* v. *Alfonso*, 552 F. 2d 605 (C.A. 5). Agent Bryant's lengthy affidavit meticulously described the efforts to establish petitioners' criminal activity without the use of electronic surveillance, and, accordingly, the affidavit was sufficient to establish the need for the interception.

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[8]As we have noted in our brief in opposition to certiorari in *Berlin* v. *United States*, No. 77-548, certiorari denied, January 9, 1978, the *Kalustian* panel appears to have required greater specificity in supporting affidavits than has been required by other courts, even in the Ninth Circuit. See *United States* v. *Spagnuolo*, 549 F. 2d 705 (C.A. 9). For the reasons stated in our brief in *Berlin*, we have not suggested that this inconsistency merits review by this Court, and nothing has happened recently to justify any change in this Court's refusal to review decisions alleged to be inconsistent with *Kalustian*. We are sending petitioners copies of our brief in *Berlin*.

3. Petitioners contend that the issuing judge's failure personally to date the order rendered it invalid, because, they argue, the absence of a date made the order unlimited in duration, in violation of 18 U.S.C. 2518(4)(e) and (5).[9] The facts belie this contention.

The order specified that the surveillance "must terminate" not later than "fifteen (15) days from the date of this Order" (Pet. App. A-21), and it is undisputed that the electronic surveillance of Stone's telephones lasted just 15 days—from November 20, 1973, until December 4, 1973 (Pet. 77-690, p. 5). The testimony of Harold Jacquet, the Assistant United States Attorney who applied for the order, and Agent Bryant, the agent in charge of the investigation who was present in Judge Taylor's chambers when the order was signed, established that the order was signed and issued on November 20, 1973 (C.A. App. 51, 79-80). It is uncontested that, after the order was signed, it was taken to the court clerk's office for filing, where it was date-stamped "November 20, 1973" (C.A. App. 123-125). On application of the government, Judge Taylor amended the order *nunc pro tunc* to include the date of issuance (C.A. App. 194-196).

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[9]18 U.S.C. 2518(4)(e) provides that:

> Each order authorizing or approving the interception of any wire or oral communication shall specify—
>
> (e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

18 U.S.C. 2518(5) provides in pertinent part:

> No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days.

Relying on *United States* v. *Lamonge*, 458 F. 2d 197 (C.A. 6), certiorari denied, 409 U.S. 863, petitioners argue that the order was invalid simply because Judge Taylor did not date it in his chambers when he signed it. Although the court in *Lamonge* suggested that an undated order would be invalid because it would be impossible to tell from its face when the authorized period of interception began,[10] there was no such difficulty here. This order was date-stamped by the clerk on the same day it was signed; Agent Bryant, who was in charge of the FBI interception operation, had personal knowledge of when the order was issued. Under these circumstances the agents conducting the interception were fully informed of the permissible duration of the surveillance and, in fact, the interception was conducted in strict conformity with the limitations of the order. There was no error and, if there were, it would be well within the scope of correction permissible under Fed. R. Crim. P. 36.[11]

4. The intercept order provided that the public telephones could be monitored only when it was determined by physical surveillance that Stone was on the premises and could be intercepted only when Stone was identified as a party to the conversation (Pet. App. A-20). Petitioners in Nos. 77-690 and 77-5730 argue that all the

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[10]The conviction in *Lamonge* was affirmed because the court concluded that the evidence derived from the interception was irrelevant in light of the defendant's reliance on an entrapment defense. The court's discussion of the sufficiency of the order therefore was *dictum*.

[11]Rule 36 provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

intercepted conversations should have been suppressed because the agents occasionally failed to comply with these terms.[12]

A copy of the order was given to Agent Bryant to post in the Federal Bureau of Investigation's "wire room" (C.A. App. 125). Assistant United States Attorney Jacquet gave the agents conducting the interception instructions regarding the restrictive requirements in the order (C.A. App. 130-131, 139-140). The testimony of Jacquet, taken together with the reports submitted to Judge Taylor (Pet. App. A-52 to A-55), shows that a good faith effort was made to conform to these requirements and to avoid the unauthorized interception of calls between third parties. This investigation was not conducted in disregard of the court-ordered restrictions, as was the interception in *United States* v. *George*, 465 F. 2d 772 (C.A. 6), on which petitioner Daidone relies (Pet. No. 77-5730, p. 6). On the contrary, as the court below held, the agents did all that was reasonably possible to comply with the court's order, although they were sometimes unable to determine when

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[12]Petitioners in No. 77-690 also argue (Pet. 11-13) that this failure affected one of the "statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures" (*United States* v. *Giordano*, 416 U.S. 505, 527), and thus warranted suppression regardless of any good faith efforts to minimize unnecessary interceptions. But no statutory requirement dictated the limitations on the interception of conversations on the restaurant telephones; these limitations were contained only in the order, and thus reflect no "congressional intention" at all. Moreover, petitioners' interpretation of the order as absolutely precluding even inadvertent interceptions not within the terms of the order is contrary to that of the author of the order; when Judge Taylor was informed of the inadvertent interceptions, he agreed with Jacquet's suggestion that serving inventories on all identifiable people whose conversations had been overheard would cure any error (C.A. App. 144-145).

Stone left the restaurant and occasionally intercepted calls to which he was not a party because of difficulties in voice identification (Pet. App. A-7 to A-8).[13]

In a related argument, petitioners contend that suppression is required because the five-day reports submitted to Judge Taylor (Pet. App. A-52 to A-55) did not detail the agent's difficulties in identifying Stone's voice. In fact, the five-day reports did inform the judge of the difficulty in identifying Stone's voice (Pet. App. A-52), and, as Jacquet testified, most of the misidentifications were discovered after the conclusion of the interception (C.A. App. 146-147). What is more, even this was unnecessary, because the order required only that the reports include a statement of the progress being made and the need for continued interception (Pet. App. A-21). Under these circumstances the government adequately complied with the reporting requirement outlined in the order.[14]

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[13]This Court need not hold this petition pending a decision in *Scott* v. *United States*, No. 76-6767, certiorari granted, October 11, 1977. The issue in *Scott* is whether the alleged subjective intent of the monitoring agents to intercept every call constituted a violation of the statutory minimization requirement, although the interception of every call was objectively reasonable. Here there is no claim that the monitoring agents had any improper subjective intent; there was, in fact, very substantial minimization of the calls overheard, and the particular minimization rule in the intercept order exceeded the statutory minimization requirement.

[14]Of course, if the supervising judge should believe that the progress reports are insufficient he could require further information; no such request was made here, and there is no indication that any information was intentionally concealed from the judge. Because progress reports are not required by statute, the determination of their adequacy is peculiarly a matter for the supervising judge. *United States* v. *Iannelli*, 477 F. 2d 999 (C.A. 3), affirmed on other grounds, 420 U.S. 770.

5. The interception was concluded on December 4 and the tapes were sealed on December 17 (Pet. No. 77-690, p. 19). Petitioners in No. 77-690 argue that the interception evidence should have been suppressed because the tapes of intercepted conversations were not immediately sealed, as 18 U.S.C. 2518(8)(a) requires.[15]

The purpose of the sealing requirement is to preserve the integrity of the tapes by assuring that tampering or editing will not take place and, in the absence of a showing that a brief delay in sealing was prejudicial, suppression is not required. *United States* v. *Angelini*, 565 F. 2d 469 (C.A. 7) (38 day delay adequately justified);[16] *United States* v. *Lawson*, 545 F. 2d 557 (C.A. 7); *United States* v. *Sklaroff*, 506 F. 2d 837, 840-841 (C.A. 5), certiorari denied, 423 U.S. 874 (14 day delay constitutes "substantial compliance" with Section 2518(8)(a)); *United States* v. *Falcone*, 505 F. 2d 478 (C.A. 3), certiorari denied, 420 U.S. 955.[17] Accordingly, the court of appeals properly concluded that "[t]he defendants have not shown that they were prejudiced by the delay or that the integrity

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[15]18 U.S.C. 2518(8)(a) provides in pertinent part:

> Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. * * *

[16]*Angelini* cites the court of appeals' opinion in the present case as persuasive authority.

[17]The rule may be different where substantial delays are involved. Compare *United States* v. *Gigante*, 538 F. 2d 502 (C.A. 2) (delays of from 8 months 12 days to 12 months 25 days), with *United States* v. *Caruso*, 415 F. Supp. 847, 850-851 (S.D. N.Y.), affirmed, 553 F. 2d 94 (C.A. 2) (24 and 42 day delays).

of the interceptions was in any way disturbed. There was no error in refusing to suppress the evidence on this basis" (Pet. App. A-9).[18]

6. Petitioner Goldstein argues (Pet. No. 77-724, pp. 11-12) that the evidence concerning his recorded conversations must be suppressed because the government failed to notify Judge Taylor that these conversations had been intercepted, so that the judge could determine whether to require the service of an inventory notice on Goldstein.

The statute requires that the supervising judge shall, within 90 days of the termination of the interception, require the service of inventories "on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice" (18 U.S.C. 2518(8)(d)). Goldstein was not identified in the application or order, and he does not contend that he should have been. Indeed, his voice was not identified until well after the period for service of inventories had passed. His attorney was notified in August 1974 that Goldstein had been overheard, and the hearing on defendants' motion to suppress was held in June 1975. In these circumstances, the failure to inform Judge Taylor that Goldstein had been overheard was inadvertent and caused petitioner no prejudice. The court of appeals correctly concluded that suppression was not required (Pet. App. A-9 to A-10). See *United States* v. *Donovan*, 429 U.S. 413, 439 n. 26.

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[18]The interception here terminated more than a year before the institution of the particularized procedures to remind officials of the various steps necessary upon discontinuation of an interception, which we described to this Court in our brief in opposition in *Falcone* v. *United States*, Nos. 74-5500 and 74-5619.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1978.

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